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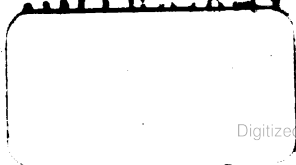
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# **REPORTS OF CASES**

**HEARD AND DETERMINED IN THE**

**APPELLATE DIVISION**

**OF THE**

**S U P R E M E C O U R T**

**OF THE**

**STATE OF NEW YORK.**

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**MARCUS T. HUN, REPORTER.**

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**VOLUME LXXVII.**

**1903.**

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\* Designated by the Governor on December 8, 1902, to sit temporarily.

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The attention of the profession is called to the fact that the Court of Appeals in many cases decides an appeal upon other grounds than those stated in the opinion of the court below.

The affirmance or reversal of the judgment of the Appellate Division does not necessarily show that the Court of Appeals concurred in, or dissented from, the statements contained in the opinion of the Supreme Court. (*Rogers v. Decker*, 181 N. Y. 490.)—REP.



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**APPELLATE DIVISION,**  
**November, 1902.\***

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**HULBERT GRAY, Appellant, v. THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Respondent.**

*Negligence — a gateman at a railroad crossing closing the gate after signaling a man driving a horse and buggy to cross the tracks — liability where the horse takes fright and runs away — duty to look up and down the track — refusal of the court to allow the plaintiff to explain his failure to do so.*

In an action brought to recover damages for personal injuries it appeared that the plaintiff was driving a horse and buggy in the daytime southerly along a highway which crossed the defendant's railroad tracks; that, as he approached the crossing, a west-bound freight train, standing east of the crossing, was preparing to move and that, in order to avoid frightening his horse, the plaintiff drove into an adjoining yard and waited until the train commenced to move; that he then drove back into the highway at a point 100 feet or more distant from the crossing; that, as the train had about cleared the crossing, the defendant's gateman raised the gates guarding the crossing and beckoned the plaintiff to come across; that the plaintiff thereupon started his horse on a slow trot for the crossing, devoting his attention to the horse, the crossing and the gateman, and not looking either easterly or westerly along the tracks to any extent; that, as he came within a short distance of the tracks, an east-bound train suddenly came in sight and the gates were lowered in front of the horse, which took fright and ran away.

The evidence indicated that both the sudden lowering of the gates and the passing of the train contributed to the frightening of the horse. The plaintiff's view of the defendant's tracks to the west was obstructed by trees and other obstacles while the gateman's view in that direction was unobstructed.

*Held*, that it was error for the court to nonsuit the plaintiff;

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\* The other cases of this term will be found in volume 76 App. Div. — [R&P.

That the underlying cause of the accident was the gateman's act in signaling the plaintiff to cross the tracks when the approaching train was too close to afford an opportunity for a safe passage, and that it was for the jury to say whether the giving of such signal constituted negligence on the part of the defendant;

That it could not be said, as a matter of law, that the plaintiff was guilty of contributory negligence in not looking up and down the tracks, as he approached the crossing, and seeing and avoiding the east-bound train;

That it was improper for the court to refuse to allow the plaintiff to explain his failure to look to the west as he approached the crossing.

MOTION by the plaintiff, Hulbert Gray, for a new trial upon a case containing exceptions, ordered to be heard at the Appellate Division in the first instance, upon the dismissal of the complaint by direction of the court after a trial at the Cayuga County Trial Term.

Also an appeal by the plaintiff from an order made at the Cayuga Trial Term and entered in the office of the clerk of the county of Cayuga on the 16th day of October, 1901, denying the plaintiff's motion for a new trial made upon the minutes.

*James Wright*, for the appellant.

*Daniel M. Beach*, for the respondent.

HISCOCK, J. :

This action was brought to recover damages sustained because of plaintiff's horse becoming frightened and running away. Said fright occurred at a highway crossing of defendant's tracks near the village of Weedsport, and was occasioned by the sudden lowering of defendant's gates in connection with the passage of one of its trains. Plaintiff complains of defendant because, as he claims, he was invited by its gateman to cross the tracks upon assurances of safety, and then when he had come close thereto the passage of the train and the lowering of the gates suddenly took place.

We think the conduct of the defendant and plaintiff upon the occasion in question should have been passed upon by the jury, and that it was error for the learned trial justice to grant a nonsuit.

The evidence upon the trial beyond any question would have warranted a jury in finding the following facts :

Defendant's tracks at the point in question ran substantially east and west and consisted of the four regular tracks and one branch or

switch track lying northerly thereof. The road upon which plaintiff was traveling ran substantially north and south. The accident took place in the daytime. Plaintiff was approaching from the north driving the horse in question attached to a buggy. A west-bound freight train was standing upon the branch in question easterly of the highway getting up steam. As a matter of precaution and to avoid fright of his horse, plaintiff drove into an adjoining yard until said train should pass by. As it commenced to move westerly over the crossing he drove back into the highway at a point distant from the crossing 100 feet or more. As the train was about clearing the crossing defendant's gateman raised the gates and beckoned to plaintiff to come across. At that time the plaintiff was either standing still or moving very slowly in the road. Upon receiving the signal he started his horse on a slow trot for the crossing. As he came within a short distance of the tracks suddenly a train came from the west and the gates were lowered in front of his horse, which took fright and ran away.

As plaintiff approached the crossing, after receiving the signal of the gateman, he watched his horse, the crossing and the gateman, and did not look either easterly or westerly upon the tracks to any extent. There were obstructions to his view towards the west from whence the train in question approached. These obstructions consisted, amongst other things, of a row of trees upon the westerly side of the highway extending nearly down to the tracks; also of quite a large orchard situated westerly of the highway and in the angle between it and the railroad tracks; also of two other short rows of trees westerly of the highway and extending at right angles with it. In addition the freight train first mentioned proceeding westward upon the branch track for some distance obstructed plaintiff's view of the main tracks. Defendant's gateman had a long unobstructed view of all its tracks towards the west subject to the temporary interruption thereof by passing trains.

It may be doubtful whether a jury would have had the right to say that the fright of plaintiff's horse was caused in whole or in part by the passage of the train. Plaintiff himself states at one or more places that it was the sudden lowering of the gates in front of his horse that frightened him. Other evidence which was before the jury, however, indicated that the fright of his horse occurred coin-

cidently with the passage of the train and under such circumstances that we think a jury might have been permitted to say that the latter contributed to the fright. We, however, do not regard it as of special significance in this case whether the horse was scared by the passage of the train or by the unexpected and abrupt lowering of the gates or by both together.

It readily may be conceded, as argued by defendant's counsel, that under many circumstances a railroad company would not be liable for the fright of a horse at a highway crossing. If a traveler voluntarily, and acting upon his own responsibility, should approach a crossing and his horse should become frightened by the ordinary passage of a train or by the proper lowering of the gates there could not be a recovery. His mishap would be the result of risks naturally and reasonably incident to the operation of a railroad.

We do not, however, regard this appeal as presenting such a case. Here the plaintiff was proceeding with more than ordinary caution, keeping away from the crossing while trains were being operated thereover, and apparently seeking to avoid just such an accident as finally did overtake him. He was drawn away from this course of conduct by defendant's agent. Not only by the raising of the gates, but by the affirmative, specific signal of the gateman he was invited and directed to cross the tracks. He was, in effect, assured that the crossing would continue clear for a long enough time to enable him to reasonably and safely proceed over it. He was, as we think, in substance guaranteed that there would be no material change in the conditions which surrounded the crossing while he was proceeding over it which would be reasonably calculated to increase his risks in so doing. Obeying and acting upon the directions and assurances which he received, as a jury might say, he started to make the crossing, and then, when he had come in close proximity thereto, a train suddenly passed over it, and the gates were lowered in front of his horse, causing the accident complained of. We think there is no reasonable opportunity for difference in opinion that the passage of the train and the lowering of the gates were a breach and a violation of the signals and directions which the gateman had given to plaintiff to proceed. It seems to us also quite clear that a jury would have the right to hold defendant responsible for the damages which resulted from such conduct. Very likely when plaintiff had

been brought close to the tracks and the train approached the crossing, it was the duty of the gateman to drop the gates. That was perhaps necessary as the lesser of the two evils and to prevent a still more serious accident than did happen. The fault of the defendant's employee might be said by a jury to lie back of that act, and to have been committed when he signaled plaintiff to cross the tracks, with the implied assurance that he had sufficient time to do it, when, as a matter of fact, the approaching train did not afford such opportunity for safe passage. We think it was for the jury to say whether such conduct was or was not improper and negligent.

It is urged by defendant's counsel that, even if the latter was negligent, the plaintiff himself was guilty of contributory negligence in not looking up and down the tracks and seeing and avoiding the approaching train. We think, however, that this question was also for the jury. The plaintiff received the invitation and signal already mentioned to proceed across the tracks. It is well settled that the mere raising of the gates was such an assurance as would very materially relieve him from the ordinary precautions to be observed while approaching the tracks. In addition to that, however, in this case the flagman, by his own personal signals, invited him to come on and practically told him that no train was approaching which would interfere with his crossing the tracks. When one of its servants has given such assurances of safety as these it does not lie with the defendant to complain because the traveler has not been alert to discover conditions which are at variance with those which he has been told exist. The plaintiff watched the horse, the crossing and the gateman, very likely believing that if any change did occur the latter would indicate it to him. In addition there were substantial obstructions to his seeing the train in question even if he had looked for it. We do not feel prepared to say as a matter of law that he did differently than a man of ordinary prudence would do under similar circumstances.

The discussion of the latter question brings us to the consideration of one or more rulings made by the trial justice in excluding evidence. Assuming that this question of plaintiff's contributory negligence is and was a close one upon the law, it was incumbent upon the trial court to allow plaintiff to give any proper explanation of his conduct in not looking for an approaching train. Upon this

line of examination plaintiff's counsel asked him questions tending to draw out that he relied upon the signals of the flagman in approaching the crossing, and that as he approached he was looking at the gate and the flagman. He was then asked this: "Q. When you were out in the road after having left the Adkinson yard and was in the road with your horse headed southward why didn't you look west?"

This was objected to by defendant and the objections sustained, to which exception was taken. We think this was error. We think the question legitimately called for any proper explanation which the plaintiff might desire to give of his failure to look up the tracks as it is now claimed by the defendant he should have done. We cannot say that his answer would not have been material upon this issue.

The exceptions of plaintiff should be sustained, the order denying a new trial reversed, and a new trial granted, with costs to appellant to abide event.

McLENNAN, SPRING, WILLIAMS and DAVY, JJ., concurred.

Plaintiff's exceptions sustained, order denying motion for new trial reversed and new trial ordered, with costs to the appellant to abide the event.

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JOHN F. LEARY and ROBERT E. MALONE, Composing LEARY & MALONE, Respondents, v. THE ALBANY BREWING COMPANY, Appellant.

*Agency — proof of — declarations of the agent as — contract not within the scope of a corporation's business — it must be authorized by the board of directors.*

The authority of an agent to do a specific act on behalf of a principal may be proved by the instrument creating the agency or by verbal statements of the principal showing that the principal has held the agent out to the world in other instances as having authority embracing the particular act in question; but such authority cannot be established by the unauthorized representations of the alleged agent not made in connection with some act done in performance of his duties as agent.

A contract made by the assistant manager of a domestic brewing corporation, outside of the scope of its legitimate business, by which the brewing company

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agrees to pay for plumbing work done in a saloon belonging to one of its customers, is not binding upon the corporation in the absence of proof that the board of directors of the corporation authorized its assistant manager to make such a contract.

**APPEAL** by the defendant, The Albany Brewing Company, from a judgment of the Supreme Court in favor of the plaintiffs, entered in the office of the clerk of the county of Herkimer on the 16th day of December, 1901, upon the verdict of a jury, and also from an order entered in said clerk's office on the 16th day of December, 1901, denying the defendant's motion for a new trial made upon the minutes.

*Florence J. Sullivan*, for the appellant.

*Raymond D. Fuller*, for the respondents.

**DAVY, J.:**

The plaintiffs recovered a judgment against the defendant for \$291.42 at the Herkimer County Trial Term; from that judgment and the order denying a motion for a new trial this appeal is taken.

The principal question in this case is whether the defendant ratified the contract of one John Sheridan, who was an assumed agent.

In November, 1900, William Moore, of Little Falls, with Walter Sheridan and John Sheridan went to the office of the defendant in the city of Albany to make arrangements with the defendant to sell its beer. Moore was introduced to the assistant superintendent, Mr. Grey, by Walter Sheridan, who was the defendant's agent for the sale of beer in the counties of Montgomery and Herkimer. Moore informed Grey that he was making arrangements to open a saloon in the city of Little Falls and that he wanted to borrow some money to pay for a license. Grey then asked Walter Sheridan how Moore stood generally in the community. Walter in reply said he was all right; that he was joint heir to some property in Amsterdam, and when that was paid, which would be within a month or two, he would pay it back. Grey advanced the money by giving him a check for \$144. Moore and the two Sheridans then went from the office of the defendant to the store of one George Spalt in Albany and ordered an ice box, which was shipped to Moore at Little Falls. Shortly thereafter John Sheridan and



Moore called on the plaintiffs and made arrangements with them to do the plumbing to be done in putting in the ice box. It is claimed by the plaintiffs that John Sheridan directed them to go and do the work and charge it to the defendant.

It appears that after the work was completed the plaintiffs sent the bill to John Sheridan, who approved it and forwarded it to the defendant. The bill was returned to the plaintiffs with a letter from Grey, stating in substance that they had given no instructions to have the work done and would not pay the bill.

The plaintiffs contend that the contract made by John Sheridan was subsequently ratified by the assistant superintendent of the defendant in an interview with one of the plaintiffs, John F. Leary, which occurred at the defendant's office in the city of Albany some four months after the date when the plaintiffs had the alleged conversation with John Sheridan, and about two months after the saloon in which the work was done was destroyed by fire.

Leary testified that he asked Grey to pay the bill and his reply was, that he wanted to wait and get security from Moore. Plaintiff then said to him that he had waited long enough; that the bill ought to be settled, and that he did not get any satisfaction from either the agent or him. Grey said that they had advanced all the money to Moore that they intended to until they got some security. Plaintiff asked him if Sheridan was the agent of the Albany Brewing Company, and he said he was for Montgomery and Herkimer counties. Plaintiff said he understood from what Grey had said that the defendant would not advance any more money until he got security, and that there was no direct promise by Grey to pay the bill.

Grey denies that he ever stated to the plaintiff that John Sheridan was their agent in Montgomery and Herkimer counties, but he did say that Walter Sheridan was their agent for three counties, and that he never agreed, directly or indirectly, to pay plaintiff's bill; that John Sheridan never was the agent of the defendant either for the sale of beer or for making contracts of any kind. John Sheridan testified that he never acted as agent for the company, and that he had no authority from the defendant to make the contract in question.

There is no evidence in the case that he was ever the agent of

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the company, except his own alleged declaration at the time the contract was made with the plaintiffs. There is no evidence that the defendant ever held him out to the world as possessing any authority to transact any kind of business for the company.

It is a well-settled rule of law that a principal is bound only by the authorized acts of his agent. The authority to act may be proved by an instrument in writing creating the agency, or by verbal statements of the principal it may be shown that the principal has held the agent out to the world in other instances as having authority which will embrace the particular act in question. But it cannot be created by the unauthorized representations of the agent.

The declarations of an agent, in order to be competent evidence against the principal, must be made in connection with some act done in performance of his duties as agent or, in other words, the representations of the agent when not expressly authorized by the principal must, in order to bind him, be within the scope of his agency. (*Manhattan Life Ins. Co. v. F. S. S. & G. S. F. R. R. Co.*, 139 N. Y. 151; *Anderson v. Rome, W. & O. R. R. Co.*, 54 id. 334.)

Applying the principles which have just been stated to the case at bar, they are decisive against the plaintiffs.

John Sheridan had no power to make any contract with the plaintiffs in reference to doing the work for Moore. The authority which he assumed had never had any existence. All that can be said in behalf of the plaintiffs on this point is that John Sheridan told the plaintiffs that he was the agent of the defendant and to send this bill to him and he would "O. K." it and send it to the defendant. It appears that Sheridan was an entire stranger to the plaintiffs. They never knew him before this occasion, and they never made any inquiry of the defendant or any other person as to his right to make such a contract. They relied wholly on his representations as to his authority to make the contract. These representations, which were the unauthorized declarations of an assumed agent, were not binding upon the defendant.

No representations are sufficient to create an agency. Any person may bind himself as he pleases, but to be bound by the act of another, that other must have authority to do the act. (*Marvin v. Wilber*, 52 N. Y. 273.)

An agent cannot bind a party for whom he is not an agent, no matter how much he assumes. He cannot create an agency by representations. (*Marvin v. Wilber, supra*; *People's Bank v. St. Anthony's R. C. Church*, 109 N. Y. 523.)

Even the assistant manager of the corporation could have no power to make such a contract unless authorized by the board of directors. He would not have the power to bind the defendant in making contracts outside of the legitimate business which the corporation was authorized to transact under its charter.

A corporation like the defendant is created and exists by virtue of the statute laws of the State and is organized for purposes defined in its charter, and he who deals with such a corporation is chargeable with notice of the purposes for which it was organized, and when he deals with an agent who is an entire stranger to him he is bound to know the agent's power and the extent of his authority to act in the matter.

In this case the plaintiffs were chargeable with knowledge that this corporation was organized for the purpose of manufacturing ale and beer. They were chargeable with notice that it was no part of the legitimate business of the corporation to go into the plumbing business, or erecting, building or fitting up saloons for their customers. It can never be presumed that the agent of such a corporation has authority to transact business which the corporation itself is not by its charter authorized to transact.

It was stated by Judge EARL in *Alexander v. Cauldwell* (83 N. Y. 485) that "Every one knows that corporations are artificial creations existing by virtue of law and organized for purposes defined in their charters; and he who deals with one of them is chargeable with notice of the purpose for which it was formed; and when he deals with agents or officers of one of them he is bound to know their powers and the extent of their authority."

In *Filon v. Miller Brewing Company* (38 N. Y. St. Repr. 602), a case somewhat similar to the one at bar, the action was on a lease alleged to have been executed by the defendant corporation as lessee. The plaintiffs were owners of property which was used as a restaurant and summer hotel at Irondequoit bay. The defendant, the Miller Brewing Company, was a corporation organized under the General Manufacturing Companies Act (Laws of 1848,

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chap. 40) for the purpose of the manufacture and sale of beer and malt. Harris, who purchased and sold the defendant's beer, applied to the plaintiffs to rent the premises and they refused to lease to him without security. The secretary of the Miller Brewing Company executed the lease in the name of the corporation after obtaining the individual consent of a majority of the trustees. The action was brought against the brewing company to recover the amount due upon the lease. The court held that the action could not be maintained against the corporation; that the individual consent of a majority of the trustees that the secretary might execute the lease for the corporation conferred no authority on him to sign the lease, and that neither the individual members of the board nor the board of trustees itself could confer such authority, as the corporation had no such authority under its charter, and, therefore, the contract was *ultra vires*.

In *People's Bank v. St. Anthony's R. C. Church* (*supra*), Judge ANDREWS says: "The trustees of a corporation have no separate or individual authority to bind the corporation, and this although the majority or the whole number, acting singly and not collectively as a board, should assent to the particular transaction."

There is no evidence in this case that the board of directors ever authorized its assistant manager to make any contracts outside of its legitimate business.

We think that the verdict is contrary to the evidence and a new trial should be granted, with costs to the appellant to abide the event.

McLENNAN, SPRING, WILLIAMS and HISCOCK, JJ., concurred.

Judgment and order reversed and new trial ordered, with costs to the appellant to abide event upon questions of law and of fact.

JESSIE L. GOLDIE, Respondent, v. WILLIAM GOLDIE, JR., Appellant.

*Contempt of court — proceedings to punish a husband for non-payment of alimony — notice of the application must be given to him — service upon his attorney is insufficient — demand for alimony.*

Proceedings in contempt are to be construed *stricti juris*; all the rights of the defendant must be carefully protected, and he cannot be adjudged guilty unless there has been a literal compliance with the law.

The constitutional provision that no person shall be deprived of life, liberty or property without due process of law requires that, before a person can be punished by imprisonment for a contempt in disobeying an order, he must have had notice of it and an opportunity to be heard before a court clothed with authority to act and decide the questions involved.

Under title 8 of chapter 17 of the Code of Civil Procedure which, by the terms of section 1778 of that Code, governs contempt proceedings instituted for a failure to pay temporary alimony, it is necessary that a personal demand be made upon the defendant for the payment of the alimony, and that the order to show cause why he should not be punished for contempt be served upon him personally. Service of the order to show cause upon his attorney is not sufficient.

SPRING and WILLIAMS, JJ., dissented.

APPEAL by the defendant, William Goldie, Jr., from an order of the Supreme Court, made at the Erie Special Term and entered in the office of the clerk of the county of Erie on the 30th day of July, 1902, adjudging the defendant guilty of contempt for an alleged failure to pay temporary alimony in pursuance of two orders theretofore entered in the action.

*Thomas A. Sullivan*, for the appellant.

*Clark H. Hammond* and *Charles Diebold, Jr.*, for the respondent.

DAVY, J.:

This is an appeal from an order of the Special Term of the Supreme Court, adjudging the defendant guilty of contempt of court for an alleged failure to pay alimony.

The original order was personally served on the defendant, who paid \$25 weekly until November 25, 1901. An order was then obtained by the defendant reducing the amount of plaintiff's temporary alimony to \$20 a week. Under the original order as modified, the temporary alimony was not payable until plaintiff turned

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over to the defendant certain household goods which belonged to him. Defendant paid the sum of \$175 under the original order as modified, so that on May 5, 1902, there was \$263 temporary alimony due the plaintiff. The court, under its order of May 19, 1902, gave plaintiff the option of delivering the property in dispute to defendant or a bond in the sum of \$750 for the delivery of such property to him, if it should be determined in an action brought for that purpose that the property belonged to the defendant. The court in this order further directed that, in the event of defendant's failure to pay the \$263 alimony then due within ten days after the delivery of the bond or the property, upon filing an affidavit showing such failure, the defendant should be adjudged in contempt. Plaintiff caused the bond to be served as directed, but defendant failed to pay the accrued alimony. On June 24, 1902, plaintiff obtained an order *ex parte* punishing the defendant for his failure to pay the alimony. This order was vacated and set aside upon the ground that defendant should have had due notice of the application. Thereafter plaintiff obtained another order directing defendant to show cause why he should not be punished for his failure to pay the sum of \$263 temporary alimony. This order to show cause was served on the defendant's attorneys, and on the return day the defendant did not appear and the order adjudging him in contempt was granted, and from that order the defendant appeals.

The principal question is, was there such an irregularity or defect in the granting of the order under which the defendant was arrested and imprisoned as to require that it be set aside.

It is urged by the learned counsel for the appellant that the order punishing the defendant for contempt should have been served upon him personally instead of upon his attorneys; that a personal demand should have been made upon the defendant to comply with the terms of the order, and that he should have been given an opportunity to be heard before punishing him for contempt.

It has been frequently held that before a party can be adjudged finally guilty of contempt and punished, he should have an opportunity to be heard. In the case at bar that opportunity was not given. The defendant, when he was arrested, was not brought before the court for the purpose of being heard and to enable him to purge himself of the alleged contempt if he could do so.

It is well settled that proceedings in contempt are to be construed *stricti juris*, and all the rights of the defendant must be carefully protected and no conviction should be had unless there has been a literal compliance with the law.

No principle is more vital to the administration of justice than that no man should be condemned in his person or property without notice and an opportunity to make his defense.

The Constitution of the United States declares that no person shall be deprived of life, liberty or property without due process of law. (14th amendt. § 1.) A provision of the same words is contained in the Constitution of this State. (Art. 1, § 6.) Punishment for contempt involves the loss of liberty or property.

The meaning of the words "due process of law," as used in both Constitutions, has been explained and defined by very able and learned judges. I need only refer to some of the cases in which these opinions may be found.

In *Stuart v. Palmer* (74 N. Y. 191) Judge EARL said: "Due process of law requires an orderly proceeding adapted to the nature of the case in which the citizen has an opportunity to be heard, and to defend, enforce and protect his rights. A hearing or an opportunity to be heard is absolutely essential."

In *People ex rel. Witherbee v. Supervisors* (70 N. Y. 234) Judge FOLGER, in speaking for the court, said: "Due process of law requires that a party shall be properly brought into court, and that he shall have an opportunity when there to prove any fact which, according to the Constitution and the usages of the common law, would be a protection to him or his property."

It would seem, therefore, that the Constitution, as interpreted by the courts of this State, means that due process of law requires that before a person can be punished by imprisonment for a contempt in disobeying an order, he must have notice of it and an opportunity to be heard before a court clothed with authority to act and decide the questions involved.

It is urged by the learned counsel for the plaintiff that the service on the defendant's attorneys of the order to show cause why the defendant should not be punished for contempt was authorized by section 1773 of the Code of Civil Procedure, and for the failure to pay the amount ordered defendant was liable to be adjudged in

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contempt and committed under the authority of said section. That section expressly provides that proceedings to punish a party for contempt must be taken as prescribed in title 3 of chapter 17 of the Code.

Section 2269 of that chapter and title provides that "The court or judge, authorized to punish for the offense, may, in its or his discretion, where the case is one of those specified in either of the last two sections, and, in every other case, must, upon being satisfied, by affidavit, of the commission of the offense, either :

"1. Make an order, requiring the accused to show cause before it, or him, at a time and place therein specified, why the accused should not be punished for the alleged offense ; or,

"2. Issue a warrant of attachment, directed to the sheriff of a particular county, or, generally, to the sheriff of any county where the accused may be found, commanding him to arrest the accused, and bring him before the court or judge, either forthwith, or at a time and place therein specified, to answer for the alleged offense."

One of the preceding sections referred to (§ 2268) provides that "Where the offense consists of a neglect or refusal to obey an order of the court, requiring the payment of costs, or of a specified sum of money, and the court is satisfied, by proof, by affidavit, that a personal demand thereof has been made, and that payment thereof has been refused or neglected, it may issue, without notice, a warrant to commit the offender to prison, until the costs or other sum of money, and the costs and expenses of the proceeding are paid, or until he is discharged according to law."

It will be seen from the above section of the Code that there are two methods of procedure against a party for such misconduct. The court shall either grant an order that the accused party show cause at some reasonable time therein specified why he should not be punished for the alleged misconduct, or issue an attachment to arrest such party and to bring him before the court.

But whichever mode of procedure is adopted the judge must be satisfied by affidavit of the commission of the offense. Until that has been done no order to show cause can be issued. The offense cannot be committed until the order directing the payment of alimony has been brought to the attention of the defendant and demand has been made upon him personally that it be paid, and



he is not guilty of contempt of court until after that demand has been refused or neglected. (Code Civ. Proc. § 2268; *Flor v. Flor*, 73 App. Div. 262; *McComb v. Weaver*, 11 Hun, 271; *Delanoy v. Delanoy*, 19 App. Div. 295; *Bradbury v. Bliss*, 23 id. 607; *People ex rel. Platt v. Rice*, 80 Hun, 452.)

The statute under which this proceeding is instituted does not specify in what way the order to show cause, with the affidavits on which it was founded, shall be served upon the party accused.

The method of serving papers in an action, as prescribed in article 3 of title 6 of chapter 8 (§§ 796-802) of the Code of Civil Procedure, authorizes in most cases service of a copy on the attorney of the party to be served, but this rule does not apply to the service of papers in contempt proceedings. Section 802 of the Code of Civil Procedure expressly provides that the article referred to does not apply to the service of a summons or other process or of a paper to bring a party into contempt, or to a case where the mode of service is specially prescribed by law. The authorities are numerous that personal service of the original process claimed to be disobeyed is necessary to bring the party into contempt.

In *Sandford v. Sandford* (40 Hun, 540) it was held that a party cannot be regarded as guilty of contempt for failing to comply with the directions contained in the order until a copy thereof has been served upon him.

In *McCaulay v. Palmer* (40 Hun, 40) Justice DANIELS, in delivering the opinion of the court, says: "To bring a party into contempt it is the practice of the court to require the order which he is charged with violating to be served personally upon him. This is to be done by delivering to him a copy of the order, and at the same time exhibiting to him the original. The consequences of a contempt are serious, and often severe, in the punishment pronounced by the court, and before a party can be subjected to them a strict compliance with the practice has been required to be observed."

It was remarked by Justice RUMSEY in *Bradbury v. Bliss* (*supra*) that "In any case, before a person can be punished for a contempt in disobeying an order, he must have had notice of it and an opportunity to become acquainted with its provisions, and a demand must have been made upon him to do the thing which the order required of him."

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In *McComb v. Weaver* (*supra*) the learned judge who wrote the opinion of the court said: "It seems to be settled that, in order to bring a party into contempt for disobedience of an order or judgment requiring the payment of money or the delivery of property, it is not sufficient that the order or judgment has been served on him, and he made fully acquainted with its effect; but, in addition thereto, a compliance with the order or judgment must be explicitly demanded by a party who has a right to make such demand."

In this case the defendant was adjudged guilty of contempt and a warrant of commitment was issued and the defendant arrested and imprisoned without any previous notice of the proceeding, or an opportunity to purge himself of the alleged contempt. The defendant was never personally before the court. The order, therefore, for his arrest and imprisonment was unauthorized and must be vacated.

The order appealed from should be reversed, with ten dollars costs and disbursements, and the defendant discharged from custody.

MCLENNAN and HISCOCK, JJ., concurred; dissenting memorandum by SPRING, J., in which WILLIAMS, J., concurred.

SPRING, J. (dissenting):

This action is for an absolute divorce. By an order granted May 29, 1901, the plaintiff was allowed alimony at the sum of twenty-five dollars per week. A certified copy of this order was served upon the defendant personally September 14, 1901, and he complied with it for a time by paying the sum awarded, although somewhat delinquent in making the weekly payments. Upon his application the order was modified by an order of the Special Term granted December 6, 1901, reducing the allowance to twenty dollars per week.

It was contended by the defendant upon the application for the reduction of this award that the plaintiff had in her possession a large quantity of household goods and furniture belonging to him, and she was directed by the order to transfer this property to the defendant and no alimony was to be payable until she complied with this direction, which she did at once. Thereafter the defendant

made payments along from time to time until the 6th day of May, 1902, when there remained unpaid \$263. On that day an order was granted at a Special Term of the Supreme Court requiring the defendant to show cause why he should not be punished for contempt for failing to pay the alimony granted by the previous orders. A copy of this order was served on the attorneys for the defendant and they appeared in response to it, and among other papers read in opposition to the granting of the contempt order was the affidavit of the defendant himself. Among the objections urged on his behalf was that the plaintiff had in her possession certain property of the defendant, silverware, a rug and other articles of the value of \$750. The order made at this hearing required the plaintiff to give a bond in the sum of \$750, conditioned for the delivery to the defendant of the said property, and within ten days after the execution and delivery thereof the defendant was required to pay said sum of \$263. The order further adjudged the defendant guilty of contempt in failing to comply with the orders before granted requiring the payment of alimony, and imposed upon him a fine of \$263, and also directed that he "be committed by the sheriff of any county in the State of New York to jail, to be there detained in close custody until he shall pay said sum or shall be discharged according to law." The plaintiff, in compliance with said order, executed the bond required, with the National Surety Company as surety thereon, and the same was approved by a justice of the Supreme Court and delivered to the attorneys for the defendant in compliance with the order and accepted by them. The defendant, however, failed to comply with that order by neglecting to pay the said sum of \$263. After the expiration of the said ten days an order was granted by the Special Term adjudging the defendant guilty of contempt. This order was subsequently vacated on the ground that the defendant should have had notice of the application. An order was then granted requiring the defendant to show cause why he should not be adjudged in contempt of court for failing to obey said orders. The defendant appeared in response to said order to show cause by his attorneys, and the order appealed from was granted. It provides, among other things, after adjudging the said defendant guilty of contempt, that he be committed to jail "until he shall pay said sum or shall be discharged according to law."

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The contention of the appellant is that no personal demand has been made upon the defendant as required by section 2268 of the Code of Civil Procedure. Assuming, but not conceding, that this proceeding was instituted pursuant to that section, we apprehend its strict observance is not essential in this case. To recapitulate the facts, the original order granting alimony was served upon the defendant personally. He complied with it until November 25, 1901. Upon his application a modification of this order was granted December 6, 1901, and property was directed by that order to be delivered over to him by the plaintiff, which was complied with. Then the order of May nineteenth was granted, and upon that hearing his own affidavit was read, and he again asked relief requiring the plaintiff to deliver over other property or secure it to him in case he should ultimately establish title to it. He accepted the fruits of that order in so far as it was beneficial to him. The whole sum of \$263 was then unpaid, and apparently no question was raised as to that fact by the defendant in opposing the motion. The object of the personal demand is to give him notice of the real situation and an opportunity to pay. He has persistently set at defiance the orders of the court requiring payment from him, although eager to accept the benefits which accrued to him from them. The requirement as to a personal demand must be fairly construed, and while one who is in contempt for violating the orders of the court should not be put in jail or his liberty jeopardized without the fullest opportunity to be heard, still the requirement should not be extended to enable a defiant delinquent debtor with full knowledge of his contempt to escape the punishment his misconduct merits.

This proceeding was not, however, instituted pursuant to section 2268 of the Code of Civil Procedure. The basis of it is section 1773, which provides for the enforcement of payment by punishment for contempt when there has been a default of the husband in paying the sum allowed for the maintenance of his wife. That section prescribes that the proceedings to punish the husband shall be in accordance with title 3 of chapter 17 of the act. The proceeding was evidently commenced under section 2269, which provides for a warrant of attachment to the sheriff, and is based upon an affidavit showing the commission of the offense and upon an order to show cause. There is no specific requirement in that section that a personal demand is

necessary unless the proceeding is instituted under the preceding section. Of course, irrespective of any Code provision, a man may not be incarcerated or deprived of his liberty without an opportunity to be heard, but in a case like the present, where it is apparent the delinquent has known of every order and has been persistent in evading or violating their provisions, he should not be permitted to succeed still further because the payment of the money has not been personally demanded of him.

The order should be affirmed, with ten dollars costs and the disbursements of this appeal.

WILLIAMS, J., concurred.

Order reversed, with ten dollars costs and disbursements, and motion denied.

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FRANCES BRAUN, Respondent, v. ANDREW OCHS, Individually and as Administrator, etc., of JOSEPHINE SPEIDEL, Deceased, and Others, Appellants.

*Specific performance of a contract, alleged to have been made by one since deceased, to devise a house to a relative in consideration of the latter's agreement to care for her.*

For several years prior to the death of a childless widow, she and one of her nieces and the latter's husband occupied separate apartments in a house owned by the widow in the city of Buffalo. After the widow had died intestate the niece brought an action against the decedent's personal representative and heirs at law to compel the specific performance of a parol contract alleged to have been entered into between the plaintiff and the decedent at a time when the plaintiff and her husband contemplated moving to the city of Boston, by the terms of which the decedent agreed that if the plaintiff would abandon that intention and would take care of the decedent as long as she lived she would will to the plaintiff the house in which they resided.

The existence of the oral contract rested entirely upon the testimony of the plaintiff's husband, and he testified that at the time such contract was made nothing was said as to the manner in which the decedent was to be taken care of. At the time the alleged contract was made the decedent managed her own household affairs without the assistance of the plaintiff, and no change was thereafter made in her manner of living.

It further appeared that neither the plaintiff nor her husband ever alluded to the alleged contract until the action was commenced, and that after the decedent's

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death they moved away from the house to which the contract related without asserting its existence.

*Held*, that a judgment directing the specific performance of the contract should be reversed for the following reasons, viz.: That the existence of the contract had not been sufficiently proved; that the terms of the contract, if made, were so vague and indefinite that it was not possible to ascertain the full intention of the parties therefrom, and that there had been no such part performance thereof as to justify the court in directing specific performance.

SPRING and HISCOCK, JJ., dissented.

APPEAL by the defendants, Andrew Ochs, individually and as administrator, etc., of Josephine Speidel, deceased, and others, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Erie on the 22d day of January, 1902, upon the decision of the court rendered after a trial at the Erie Special Term.

*Albert C. Spann*, for the appellants.

*Franklin R. Perkins*, for the respondent.

DAVY, J. :

This is an appeal by the defendants from a judgment of the Supreme Court rendered at the Erie County Special Term, directing specific performance of a parol agreement requiring the defendants to convey by deed to the plaintiff a house and lot No. 62 Spruce street, in the city of Buffalo, inherited by them from their sister, Josephine Speidel.

The complaint alleges that Josephine Speidel was on the 15th day of April, 1895, and for many years prior thereto, a widow without issue, and that she died intestate at the city of Buffalo on or about the 14th day of January, 1900; that on said 15th day of April, 1895, the plaintiff and her husband were about to remove to the city of Boston, Mass., where plaintiff's husband had been employed as a cabinetmaker, and the said Josephine Speidel agreed that if the plaintiff would remain in Buffalo and take care of her as long as she lived, she would will to her the house and lot No. 62 Spruce street.

The Speidels had no children and their home was also a home for needy nephews, nieces and other poor relatives of the family. The plaintiff was taken into the family when she was six years old, was educated and supported by the Speidels until the year 1887, when she married Julius Braun and moved away. Eleanora Schaff, a

niece, was taken into the family in 1878, when she was seven years old, and lived there for twelve years, when she entered a convent. In 1890, Frank Ochs, a nephew, at the age of ten, and Barbara Ochs, a sister of the deceased, both became members of Mrs. Speidel's family. Frank Ochs lived with her for about four years and Barbara continued to live with her down to the time of her death. George Schaff, another nephew, lived with Mrs. Speidel from 1891 to 1897. During the years that these various persons lived with the Speidels, they all helped to do the necessary family housework.

In 1890, on the death of Mrs. Speidel's husband, Barbara Ochs, an unmarried sister, went to live with Mrs. Speidel and remained with her down to the time of her death in 1900. During these ten years the plaintiff with her husband and four or five children lived in an upstairs flat, paying six dollars a month rent to Mrs. Speidel, who was the owner of the flat. The plaintiff together with her four or five small children had her husband and a boarder to cook and wash for. She had no servant and did her own washing. On the other hand, Mrs. Speidel and her sister did their own housework. Such in substance was the condition of affairs in April, 1895, at which time the plaintiff claims the alleged oral contract was made. It appears that there was no change in the condition of affairs or the manner of living subsequent thereto. The oral contract rests entirely upon the testimony of the plaintiff's husband. No one was present when the alleged conversation took place, except Mrs. Speidel, this plaintiff and her husband; the latter's testimony as to the contract is as follows: "It was right after Easter, 1895, a few days after I came back from Boston. My wife, Mrs. Speidel and myself were present. I came home in the evening and Mrs. Speidel was in our home, and my wife and myself, and I told my wife in the presence of Mrs. Speidel that I had engaged Mr. Harmon to pack our furniture and move to Boston. He was a sort of a carpenter. I had engaged him to pack our furniture, and Mrs. Speidel said to me if I am getting crazy to take the children and my wife away from her, as those were her only comfort now, and she said I should stay here. Mrs. Speidel said to my wife, 'You remember what you promised to Mr. Speidel, that you will stay with me and will take care of me so long as I live, and as I should look out

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for you,' and Mrs. Speidel then say to us — to me, I will find enough work here to earn my bread and butter, and I should stay. I said, 'I have no work,' and she said that she will help me out. Mrs. Speidel then said to my wife that she should stay and should take care of her so long as she lived and she will will her this house and lot, 62 Sprnce street, and I said to Mrs. Speidel, 'If that is the case I will stay.' My wife said she will stay and take care of her so long as she lives and do what she ask her to do."

On his cross-examination plaintiff's husband testified that nothing was said about how she was to be taken care of.

Assuming the facts as to the agreement to be as testified to by the plaintiff's husband, the case is not one in which the extraordinary powers of a court of equity should interfere to enforce specific performance of the contract. It is not one of those exceptional cases where courts of equity have intervened. On the contrary, it is one of those cases similar in every respect to those which courts of equity have repeatedly refused to specifically enforce.

I can find neither principle nor precedent upon which to base a decree in favor of the plaintiff, upon her alleged oral agreement. The authorities all seem to be against a court undertaking to enforce such a contract. How can the court determine what is meant by the word "care" for Mrs. Speidel during her lifetime? Nothing is said as to the manner in which she was to be cared for. Whether she was to be taken into plaintiff's family and furnished with apartments, or should be boarded and lodged by the plaintiff, with many other details, are all left to conjecture and unprovided for in the alleged agreement. In respect to those most important matters, the contract is wholly incomplete and indefinite. It is evident that the parties could not have had in mind, and did not agree as to the nature of the care and the extent of services which the plaintiff was to render during the lifetime of the decedent.

It appears from the evidence that the plaintiff did not have the care, charge and oversight of Mrs. Speidel's household or of her property. Neither did she have the care and safety of her person. She assumed no responsibility whatever in that respect. Moreover the contract is unfair because it leaves the kind of care to be furnished and the manner of furnishing it wholly to the discretion of the plaintiff.



Claims of this nature against a dead woman's estate, resting entirely in parol, based largely upon loose statements made by an interested party years after the oral agreement was made, and when the lips of the party principally interested are closed in death, require the closest and most careful scrutiny to prevent injustice being done to the heirs of the decedent.

It appears from the testimony that neither the plaintiff nor her husband ever alluded to this alleged contract to any of the defendants or any other person, either before or after Mrs. Speidel's death, until this action was commenced.

It also appears that shortly after Mrs. Speidel's death, the plaintiff's family moved away from the flat occupied by them without mentioning any agreement or asserting any claim to the possession and ownership of the property. It is hardly reasonable to suppose that the plaintiff and her husband would have removed from the premises without having announced the existence of such an agreement and asserted their rights to retain possession, if such a contract had been made.

These facts, coupled with the admissions made by the plaintiff, have a strong bearing upon the appellant's contention that no such contract was ever made. After Mrs. Speidel's death the plaintiff stated to Sister Ferdinanda, one of the nieces brought up by the decedent, that if she did not get anything from the estate she would sue for the work she had done. She said to George Schaff that if she did not get anything from Mrs. Speidel's estate they had got at least \$500 out of it, and that she was going to sue for wages.

Frank Ochs, a nephew, who had lived with Mrs. Speidel four or five years, testified that plaintiff told him that she was glad that there was no will, because they could not say that she influenced Mrs. Speidel in making it.

In all of these conversations she never alluded to any contract having been made between her and the decedent.

The services claimed to have been rendered by the plaintiff cannot be urged to furnish any proof of the existence of a contract. The plaintiff's principal witness, her husband, admitted that there was no change in the manner of living and the services rendered before and after the time of the alleged contract. Therefore, such services did not even tend to show that a contract was made.

Applying well-settled principles to the case under consideration, we think that the judgment of the Special Term was not warranted by the evidence. The contract was not made with parents for the benefit of an infant who had been adopted by the family as one of their children and should share in the estate of the decedent, but it was made directly with an adult who had no more valid claim to decedent's property than the other nieces or nephews.

The statute (2 R. S. 135, § 8, re-enacted Laws 1896, chap. 547, § 224) requires that an agreement relating to real estate shall be in writing, expressing the consideration, and, where a parol agreement is sought to be established, the proof should be clear as to the nature and specific character of the agreement so that it can be eventually carried out and enforced.

It has been frequently held that, in order to constitute a valid parol or written agreement, the parties must express themselves in such terms that it can be ascertained to a reasonable degree of certainty what they mean; and, if an agreement be so vague and indefinite that it is not possible to collect the full intention of the parties, it is void; neither the court nor the jury can make an agreement for the parties.

In *Stanton v. Miller* (58 N. Y. 200) Judge ANDREWS says: "It is an elementary principle governing courts of equity in the exercise of this jurisdiction that a contract will not be specifically enforced unless it is certain in its terms or can be made certain by reference to such extrinsic facts as may, within the rules of law, be referred to, to ascertain its meaning." (*Shakespeare v. Markham*, 72 N. Y. 400.)

Where contracts of this character are attempted to be established by parol the temptation and opportunity for fraud is such that they are looked upon with suspicion, and the courts require the clearest evidence that such a contract be founded on a valuable consideration and be certain and definite in all its parts. (*Shakespeare v. Markham*, 10 Hun, 311; *Gall v. Gall*, 64 id. 600.)

It has also been held that where there is an oral agreement to convey land upon the payment of a specific sum of money, such payment alone is deemed not sufficient to entitle the party to a specific performance of the contract unless possession has been delivered and taken thereunder, for the reason that a recovery of

the consideration or for damages may be had in an action at law. (*Miller v. Ball*, 64 N. Y. 286; *Winchell v. Winchell*, 100 id. 159, 163; *Ludwig v. Bungart*, 48 App. Div. 616.) So, where the consideration for the promised conveyance of a house and lot by will consists of services to be rendered, and the services have been performed, but the land is neither conveyed by deed nor will, equity will not compel a conveyance unless the character of the services is so peculiar that it is impossible to estimate their value by a pecuniary standard (*Rhodes v. Rhodes*, 3 Sandf. Ch. 279; *Matthews v. Matthews*, 133 N. Y. 679; *Shakespeare v. Markham*, *supra*; *affd.* by the Court of Appeals, 72 N. Y. 400; *Gall v. Gall*, 64 Hun, 600; *Ludwig v. Bungart*, *supra*), or unless the agreement has been so far executed that a refusal would operate as a fraud upon the party who has performed his part and place him in a situation in which he would not be compensated in damages.

We think that the motion for a nonsuit should have been granted. The judgment, therefore, should be reversed and a new trial granted, with costs to the appellant to abide the event.

MCLENNAN and WILLIAMS, JJ., concurred; SPRING and HISCOCK, JJ., dissented in separate memoranda.

SPRING, J. (dissenting) :

I cannot concur in the opinion of the majority in this case. The trial court has found that the contract was made as claimed by the plaintiff and has also found as a fact that it has been fully performed by her. The trial court saw the witness and was in a better situation to judge as to her credibility than we sitting as appellate judges. Unless we are to say that in actions for specific performance a different rule is to prevail in giving credence to the decision of the trial court I do not see how we can disturb the judgment in this case. The plaintiff's husband testified explicitly to the contract and its terms. It was definite and certain. It was not unfair. The plaintiff had lived with the Speidels and as a member of their family from her childhood of six years until her marriage, thirteen years later. The Speidels had no children and the plaintiff was treated as a daughter. After her marriage the relations continued affectionate and like that of parents and a daughter. By the terms of the contract the whole property of Mrs. Speidel was not to pass to the

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plaintiff. She left quite an amount of personal property and this contract related solely to the premises upon which she lived.

It is contended that the contract was not fully performed. As I say, the court has found otherwise. The performance was such as any daughter would render to a mother and that was what was designed by the agreement.

The plaintiff and her husband gave up their intention of going to Boston where the husband had work at his trade in reliance upon this promise. It was, therefore, supported at its inception by a good consideration and its performance added to it.

The contract was not unjust to the heirs at law or next of kin of the decedent. She left no children and her nearest collateral relative apparently was not needy. Again the contract might have been a very burdensome one to the plaintiff. Her foster mother was only about fifty years of age at the inception of the agreement and if she had lived her allotted time and had required care and attendance in her old age she was entitled to it under this agreement.

Contracts of this kind resting in parol have recently been enforced by this court. (*Winne v. Winne*, 166 N. Y. 263.)

The elements which must exist are that the contract is definite and certain and capable of enforcement and founded upon an adequate consideration and that it be just and fair. This agreement possesses all these requirements.

It is urged that the plaintiff may sue for her services. She was an adopted daughter, and in order to maintain an action of that character must prove a contract whereby she was to be compensated for such services. The only agreement which she is able to prove is the one which the court in this action has found, and by the decision of this court that agreement is held to be ineffective. The only remedy is for specific performance of the only contract she ever claims to have made. It often happens that where an action is brought for specific performance, the court, finding that the agreement was made, but for some equitable reason specific performance ought not to be decreed, will award damages in lieu thereof. That is not this case, for specific performance can be decreed and no equities exist whereby the plaintiff should not strictly have the benefit of her agreement.

The evidence of the witness Myerhoff, who testified that Mrs.

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Speidel said that Frances, that is, the plaintiff, was going to have all of her property upon her death, shows the intention of the intestate and also her affection for the plaintiff.

I think the judgment should be affirmed.

HISCOCK, J. (dissenting):

I fully agree with the view that a claim of the character involved in this action is to be scrutinized with great care. The decision of every such case must largely be governed by its own peculiar facts. Such careful examination of the evidence in this action seems to me to warrant a recovery. In addition, it must be borne in mind that the trial justice had the very great advantage of seeing and hearing the witnesses as they testified, and it must be assumed that the very valuable impressions and assistance to be derived from this observation were in favor of the decision which he reached. Under such circumstances I am unable to concur with the prevailing opinion in this case, and for the reasons here and in the memorandum of Mr. Justice SPRING more fully set forth, dissent.

Judgment reversed and new trial ordered, with costs to the appellant to abide event.

77 28 In the Matter of Proceedings by the CITY OF ROCHESTER, Respondent,  
f 81 \*655  
a173 NY 646  
e174 NY\*291  
e174 NY\*295  
40 Mis\*446  
under Section 82, Chapter 14 of the Laws of 1880, as Amended,  
v. JOSEPH B. BLOSS, Appellant, to Enforce the Collection and  
Payment of an Unpaid Tax and Assessment upon Personal  
Property of the said JOSEPH B. BLOSS in the Year 1899.

*Tax upon personalty — remedy where other parties liable to assessment have been omitted from the rolls — what objections can be raised in proceedings to collect a tax — necessity of affixing seals to assessment rolls — acts to legalize taxes and local assessments — when unconstitutional.*

The remedy of a person, assessed by the assessors of the city of Rochester for personal property, who is displeased with the action of the assessors in omitting from the assessment roll other persons taxable for personal property, is by certiorari proceedings under chapter 908 of the Laws of 1896. He cannot raise that objection in a proceeding for the collection of the tax instituted against him under section 82 of the city charter (Laws of 1880, chap. 14, as amd. by Laws of 1890, chap. 561).

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When the taxing officers were without jurisdiction to impose an assessment, the assessment is void and its invalidity may be asserted in any proceeding to collect the tax.

The requirement as to the affixing of a seal contained in section 86 of the charter of the city of Rochester, which provides that the warrant for the collection of taxes shall be issued under the hand of the mayor and the seal of the city of Rochester, is mandatory, and a warrant issued under the hand of the mayor without the seal of the city is void and payment of the taxes cannot be enforced.

Chapter 200 of the Laws of 1901 and chapter 719 of the Laws of 1901, entitled respectively, "An act to amend the charter of the city of Rochester relative to expenses incident to improvements," and "An act to amend \* \* \* and to consolidate therewith the several acts in relation to the charter of said city relative to expenses incident to improvements," by which the Legislature has sought to legalize every general tax or local assessment upon any real or personal property in the city of Rochester, violate section 16 of article 8 of the State Constitution, which provides, "No private or local bill, which may be passed by the Legislature, shall embrace more than one subject, and that shall be expressed in the title."

McLENNAN, J., dissented.

APPEAL by Joseph B. Bloss from an order, made by the special county judge of Monroe county and entered in the office of the clerk of the county of Monroe on the 2d day of August, 1902, denying his motion to vacate a previous order made by said special county judge directing the said Joseph B. Bloss to appear before a referee named therein and be examined concerning his property.

*Isaac Adler*, for the appellant.

*William A. Sutherland*, for the respondent.

DAVY, J. :

This is an appeal from an order of the special county judge of Monroe county refusing to set aside an order granted by said judge, requiring the appellant to appear before a referee to be examined as to his property.

The proceedings were instituted under section 82, chapter 14 of the Laws of 1880 (as amd. by Laws of 1890, chap. 561), for the collection of an unpaid tax upon personal property of the appellant for the year 1899.

There were four grounds urged by the appellant before the special county judge why the order should be vacated and set aside, namely :

*First.* That the assessors of the city of Rochester omitted from the tax roll for the year 1899 a very large number of persons taxable for personal property.

*Second.* That the affidavit of the assessors attached to the assessment roll was materially defective.

*Third.* That the warrant annexed to the assessment roll was not under the seal of the city of Rochester, as required by section 86 of the charter of said city.

*Fourth.* That no effort was made to collect the tax and no return was ever filed.

If the appellant was displeased with the action of the assessors of the city of Rochester in omitting from the assessment roll for the year 1899 a large number of persons taxable for personal property, he should have instituted proceedings by certiorari to review the actions of the assessors and have had the errors corrected.

The statute (Laws of 1896, chap. 908, § 250 *et seq*) prescribes the mode of certiorari for the review of assessments illegal, erroneous or unequal. This mode furnishes an adequate remedy to the taxpayer to correct the errors of the taxing officers, and no doubt was intended by the Legislature to be the exclusive remedy; but where there is a want of jurisdiction in the taxing officer over the person and subject-matter to impose a tax, the assessment is void and the jurisdictional defect may be raised in any proceeding to collect the tax. (*United States Trust Company v. Mayor, etc., of New York*, 144 N. Y. 488; *People ex rel. D. & H. C. Co. v. Parker*, 117 id. 86.)

The question next under consideration involves the inquiry whether the requirements of the statute as to the seal are mandatory or directory. If the former, then the warrant is defective; if merely directory, then the omission is not fatal.

The city charter (§ 86) expressly directs that there shall be annexed to the assessment rolls a warrant under the hand of the mayor and the seal of the city of Rochester, commanding the city treasurer to collect from the several persons named in the assessment rolls the several sums levied as taxes in the columns of such rolls.

If such a law was merely directory, then warrants for the collection of taxes would be as valid without a seal as with one. Every mayor whose duty it is to sign the warrant and attach the seal of the

city thereto would be at liberty to omit any one of the statutory requirements. One mayor might conclude that the ceremony of attaching a seal was idle and useless. Another might think that the warrant would be sufficient with a seal and that the name of the mayor would, therefore, be superfluous. Another might reach the conclusion that all of these requirements of the law were unnecessary and omit them altogether. Under such a system, how would the officer into whose hands the warrant was delivered for execution know whether he would be protected in enforcing the collection of taxes?

When the statute provides that a seal shall be used, the court has no power to adjudge that the mayor's signature to the warrant without the seal is sufficient. The seal is as essential under the law as the signature of the mayor, and in its absence the warrant must be held to confer no power upon the officer to whom it is directed. The statutory requirements can only be satisfied by signing and sealing the warrant. These requirements are mandatory, and a failure on the part of the official whose duty it is to issue the warrant to comply with the law in that respect renders the warrant void. The warrant, therefore, issued under the hand of the mayor, but without the seal of the city of Rochester, was void, and the collection of appellant's tax for the year 1899 cannot be enforced in these proceedings.

*Lockwood v. Gehlert* (127 N. Y. 241) was an action of ejectment to recover possession of a parcel of land. Defendant claimed title under a tax lease purchased at a tax sale, which was regular in form except that there was no seal to the certificate, as required under the statute. Judge VANN, in discussing the necessity of a seal, in his opinion said: "It is contended that the seal is unnecessary and that the provision for its use is merely directory. It is mandatory in form, for the statute\* commands that the Comptroller 'shall under his hand and seal, certify to the fact.' If not mandatory as to the seal, is it mandatory as to the signature? If the courts, by construction, may dispense with the one, why may they not dispense with the other, or with both?" (*Smith v. Randall*, 3 Hill, 495; *Clason v. Baldwin*, 152 N. Y. 204, 210.)

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\* LAWS of 1882, chap. 410, § 946.—[REP.]



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It is urged by the learned counsel for the respondent that these defects were cured by chapter 200 of the Laws of 1901, as amended by chapter 719 of the Laws of 1901 (amdg. Laws of 1880, chap. 14, §§ 198, 199).

If these statutes are constitutional, the regularity of the proceedings referred to under the city charter must be upheld. It will be seen that there are two curative statutes, the title of the first being, "An Act to amend the charter of the city of Rochester relative to expenses incident to improvements," and that of the second, "An Act to amend \* \* \* and to consolidate therewith the several acts in relation to the charter of said city relative to expenses incident to improvements." The titles of both of these acts relate to "expenses incident to improvements."

Article 3, section 16, of the State Constitution expressly provides that "No private or local bill, which may be passed by the Legislature, shall embrace more than one subject, and that shall be expressed in the title."

The amendment of the charter of the city of Rochester was local within the meaning of the Constitution. (*People v. O'Brien*, 38 N. Y. 193; *People v. Hills*, 35 id. 449; *Gaskin v. Meek*, 42 id. 186; *Matter of Estate of Goddard*, 94 id. 548.)

The act has no force beyond the corporate limits of that city and is, therefore, confined to a particular locality.

The next question is, whether any subject is contained in the act not embraced in the title.

If an act of the Legislature, local or private in character, embraces two or more distinct subjects, or embraces but one subject, and the title does not express the subject, the act must be held void as a violation of a positive requirement of the Constitution. (*People v. Hills*, *supra*; *People v. Allen*, 42 N. Y. 419; *People ex rel. City of Rochester v. Briggs*, 50 id. 553; *Mayor, etc., of New York v. M. R. Co.*, 143 id. 22; *Tingue v. Village of Port Chester*, 101 id. 302.)

The purpose and object of the Legislature in passing the act is to be judged by the body of the act itself, and the great objection to the validity of the law is, that the Legislature has in the body of the act sought to legalize every general tax or local assessment upon any property real or personal in the city of Rochester, and these

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subjects are not expressed or indicated in the title of the bill. In the enactment the Legislature has entirely lost sight of the limitation and subject expressed by the title.

The title must give the subject expressed in the act. Here the only subject suggested by the title is the amendment of the charter of the city of Rochester "relative to expenses incident to improvements."

A person reading this title would have no clue whatever to the contents of the body of the act which attempts to legalize every general tax or local assessment in the city of Rochester.

The subject-matter of the act is foreign to that indicated by the title; therefore, the act is unconstitutional.

This conclusion makes it unnecessary to consider the other questions raised by the learned counsel for the appellant, and requires that the order appealed from be reversed, with ten dollars costs and disbursements to the appellant.

SPRING and HISCOCK, JJ., concurred; WILLIAMS, J., concurred in result; McLENNAN, J., dissented.

Order reversed, with ten dollars costs and disbursements, and motion granted, with ten dollars.

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**FRANK M. BONTA, Respondent, v. FRANCIS W. GRIDLEY, Impleaded  
with WILLIS T. GRIDLEY, Appellant.**

*Contract between stockholders of a bank and a third person for the sale to the latter of stock in the bank and his election and continuance for five years as cashier—a complaint alleging a breach thereof is not demurrable, although the contract required the cashier to use his influence "towards retaining the services of the present board of directors."*

The complaint in an action brought by Frank M. Bonta against Francis W. Gridley and Willis T. Gridley alleged that the parties entered into the following agreement:

"This agreement made this 22nd day of November, 1897, by and between Francis W. Gridley and Willis T. Gridley, of Syracuse, N. Y., of the first part, and Frank M. Bonta, of the same place, of the second part, Witnesseth:

"WHEREAS, parties of the first part, being large holders of the capital stock of the Salt Springs National Bank of Syracuse, are desirous that said second

party should purchase stock thereof, and should remain with said bank and use his time and influence to promote its prosperity; now, in consideration of the covenants and agreements herein contained, to be performed by said second party, said parties of the first part jointly and severally covenant and agree to and with said party of the second part as follows:

"1. The said party of the second part shall be elected (unless he, himself, uses his own influence to prevent his election) cashier of the Salt Springs National Bank at the annual meeting thereof, to be held in January, 1898, and shall continue to hold such office for the space of five (5) years, or until the annual meeting to be held in January, 1903, unless he sooner voluntarily resigns such position, as hereinafter provided.

"2. He shall receive for his services as such cashier the annual salary of twenty-five hundred dollars (\$2,500).

"3. He shall have the power and authority and shall perform the duties usually performed by cashiers of National Banks in Syracuse, not inconsistent with law, subject to the by-laws of the bank and the resolutions of the discount committee and Board of Directors of said bank relative to loans.

"4. Said first parties will purchase of said second party the fifty (50) shares of the capital stock of said bank purchased by him, as herein provided, at any time when he ceases to be cashier thereof, and pay him one hundred and thirty-five dollars (\$135) per share therefor.

"In consideration of the premises said party of the second part covenants and agrees to and with said parties of the first part, that during the five years above described, or so long as he may remain cashier of said Salt Springs National Bank (he hereby expressly reserving the right to resign such position at any time), he will devote his whole time and attention to the promotion of the interests of the said Salt Springs National Bank, and will exercise such influence as he may possess in favor of said bank and toward retaining the services of the present board of directors. He further covenants and agrees to buy fifty shares of the capital stock of the Salt Springs National Bank at a price not to exceed one hundred and thirty-five dollars (\$135) per share;"

That the plaintiff purchased fifty shares of the capital stock of the bank for \$135 per share and entered upon the performance of his duties as cashier; that he faithfully performed all the conditions of the contract on his part until September 11, 1901, when he was discharged, without cause, from his position as cashier; that he then tendered the fifty shares of stock to the defendants and demanded the sum of \$135 per share therefor; that, upon their failure to comply with such demand, he sold the stock at public auction and received therefor \$100 per share.

The action was brought to recover damages for the breach of the contract. The plaintiff demanded judgment in the sum of \$3,750, representing the loss of \$35 per share on the fifty shares of stock and \$2,000 as liquidated damages pursuant to a clause in the contract.

*Held*, that an interlocutory judgment overruling a demurrer to the complaint should be affirmed;

DAVY and WILLIAMS, JJ., dissented.

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Per McLENNAN, J., that the contract set forth in the complaint was not void as against public policy;

Per McLENNAN and SPRING, JJ., that as the plaintiff had fully performed his part of the contract, and the defendants had had the benefit of such performance for a period of four years, the latter should not be permitted to urge its invalidity.

APPEAL by the defendant, Willis T. Gridley, from an interlocutory judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Onondaga on the 5th day of March, 1902, upon the decision of the court, rendered after a trial at the Onondaga Special Term, overruling a demurrer to the complaint.

The defendants demurred to the plaintiff's complaint herein, upon the ground that it did not state facts sufficient to constitute a cause of action, and from the judgment overruling such demurrer this appeal is brought.

The complaint demands judgment for the sum of three thousand seven hundred and fifty dollars (\$3,750) damages for the alleged wrongful breach of a written contract entered into between the parties hereto, of which the following is a copy:

"This agreement made this 22nd day of November, 1897, by and between Francis W. Gridley and Willis T. Gridley, of Syracuse, N. Y., of the first part, and Frank M. Bonta, of the same place, of the second part, Witnesseth:

"WHEREAS, parties of the first part, being large holders of the capital stock of the Salt Springs National Bank of Syracuse, are desirous that said second party should purchase stock thereof, and should remain with said bank and use his time and influence to promote its prosperity; now, in consideration of the covenants and agreements herein contained, to be performed by said second party, said parties of the first part jointly and severally covenant and agree to and with said party of the second part as follows:

"1. The said party of the second part shall be elected (unless he, himself, uses his own influence to prevent his election) cashier of the Salt Springs National Bank at the annual meeting thereof, to be held in January, 1898, and shall continue to hold such office for the space of five (5) years, or until the annual meeting to be held in January, 1903, unless he sooner voluntarily resigns such position, as hereinafter provided.

"2. He shall receive for his services as such cashier the annual salary of twenty-five hundred dollars (\$2,500).

"3. He shall have the power and authority and shall perform the duties usually performed by cashiers of National Banks in Syracuse, not inconsistent with law, subject to the by-laws of the bank and the resolutions of the discount committee and Board of Directors of said bank relative to loans.

"4. Said first parties will purchase of said second party the fifty (50) shares of the capital stock of said bank purchased by him, as herein provided, at any time when he ceases to be cashier thereof, and pay him one hundred and thirty-five dollars (\$135) per share therefor.

"In consideration of the premises said party of the second part covenants and agrees to and with said parties of the first part, that during the five years above described, or so long as he may remain cashier of said Salt Springs National Bank (he hereby expressly reserving the right to resign such position at any time), he will devote his whole time and attention to the promotion of the interests of the said Salt Springs National Bank, and will exercise such influence as he may possess in favor of said bank and toward retaining the services of the present board of directors. He further covenants and agrees to buy fifty shares of the capital stock of the Salt Springs National Bank at a price not to exceed one hundred and thirty-five dollars (\$135) per share.

"The said parties hereto further jointly and severally covenant and agree to and with each other, that in case of the breach by any of the parties hereto of the covenants and agreements herein contained, or any of them, that the party guilty of such breach shall pay to the other, in case such breach occurs during the year 1898, five thousand dollars (\$5,000); in case the breach occurs in the year 1899, four thousand dollars (\$4,000); in case it occurs during 1900, three thousand dollars (\$3,000); in case it occurs during the year 1901, two thousand dollars (\$2,000); and in case it occurs during the year 1902, one thousand dollars (\$1,000); the said sums herein provided for to be considered as liquidated damages for the breach of this contract or any part thereof, and in no respect as a penalty.

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"In Witness Whereof, the parties have hereunto set their hands and seals of the day and year first above written.

"FRANCIS W. GRIDLEY.      [L. s.]

"WILLIS T. GRIDLEY.      [L. s.]

"F. M. BONTA.      [L. s.]"

It is alleged in the complaint that in or about December, 1897, the plaintiff, in pursuance of the covenant in said agreement upon his part, purchased fifty shares of the capital stock of said bank, and paid therefor \$135 per share; that the plaintiff entered upon the performance of his duties as cashier of said bank and faithfully performed all the conditions upon his part until about the 11th day of September, 1901, when, without any fault on his part, he was discharged and removed as such cashier, and thereupon ceased to be cashier thereof; that thereafter, and on or about the eleventh and eighteenth days of September respectively, the plaintiff tendered to said Willis T. Gridley and Francis W. Gridley said fifty shares of stock, and demanded the sum of \$135 per share, and requested them to purchase the same at said price, as in said agreement undertaken by them to do, which they and each of them refused to do; that thereafter, and on the 30th day of September, 1901, plaintiff caused said stock to be sold at public auction to the highest bidder, after due notice to said defendants and each of them, and after due public notice of said proposed sale, and upon such sale received for such stock only \$100 per share. The loss of \$35 per share, amounting in the aggregate to the sum of \$1,750, added to the amount of the liquidated damages which each of the parties of the first part, the defendants, agreed to pay in case a breach of said agreement occurred during the year 1901, to wit, \$2,000, constitutes the damages which the plaintiff seeks to recover.

*B. A. Benedict*, for the appellant.

*Charles P. Ryan*, for the respondent.

**McLENNAN, J. :**

For the purposes of this review we must regard as established all the allegations of fact contained in the complaint. The principal reason urged by appellant for the reversal of the interlocutory judgment overruling the demurrer is that the contract is void, as being against public policy.

We think the contract set forth in the complaint is valid. Neither party to the contract was an officer or director of the bank. The defendants were stockholders only, presumably were interested in the welfare and success of the bank, and, so far as appears, in good faith desired to promote the best interests of the corporation in which they were thus interested, and to that end they wished to procure the services of the plaintiff, a man of large experience, as cashier, for the period of five years, and by the contract in question, not as directors or officers of the bank, but as individuals, undertook to secure such services.

To the end, as we must assume, that the plaintiff should also have a pecuniary interest in the success and welfare of the bank, the defendants required him, as a condition of his employment, to become a stockholder and to purchase fifty shares of the capital stock, they agreeing that at any time the plaintiff should cease to be cashier they, the defendants, would purchase from him such stock, at his option, and pay at least \$135 per share therefor. The plaintiff agreed that while he remained cashier he would use his influence to promote the best interests of the bank and to retain in office its then existing board of directors, which, for aught that appears, was for the best interests of the bank. He did not agree to assist in electing the defendants directors, or help to secure to them any other office, nor did he agree to vote his fifty shares of stock in any particular manner or for any particular purpose.

This state of facts clearly distinguishes the case at bar from the class of cases relied upon by defendants' counsel. In the case of *Fennessy v. Ross* (90 Hun, 298; 5 App. Div. 342) the plaintiff, who was a stockholder in three corporations, entered into a contract by which the defendant agreed to purchase stock of the plaintiff, and the plaintiff agreed that the defendant should have the management of the three corporations and equal representation with the plaintiff in the board of directors, and an annual salary fixed by the contract. In that case, also, the contract was entirely executory. It was held that such a contract was not enforceable.

The same distinction exists between the case at bar and the case of *Guernsey v. Cook* (120 Mass. 501).

So far as we have been able to discover, it has not yet been held by any court that two stockholders of a corporation may not legiti-

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mately agree between themselves to use their influence jointly to secure the election of a certain board of directors of such corporation, even if one of such stockholders happens to be its cashier, provided only that the proposed agreement is entered into in good faith and for the purpose of promoting the best interests of the corporation, and in fact does promote its best interests. (*Barnes v. Brown*, 80 N. Y. 527.) But, in addition to the contract having been fully performed by the plaintiff, and the defendants having had the benefit of such performance for a period of four years, they ought not now to be allowed to urge its invalidity.

In the case of *National Wall Paper Co. v. Hobbs* (90 Hun, 288) the court said: "It is urged, however, upon the part of the defendant, that the contract which was entered into by his firm and himself with the plaintiff was void because it was part of a corrupt and wicked conspiracy against the law and public policy of this State in that it was a combination of manufacturers for the purpose of putting up the price of goods and down the price of wages. In view of the fact that the defendant retained the price which was paid for his corrupt and wicked agreement, it is difficult to see how he can claim that he should be absolved from its obligations or how he can claim, being a party to the instrument and having received that which he considered an adequate consideration for the restraint which was put upon his volition, that such restraint should be removed and he be permitted to enjoy the fruits of what he claims to be his unlawful agreement. We do not think that the defendant is in a position to attack this contract, certainly not with its fruits in his pocket."

One who accepts and retains the benefits of a contract cannot allege, as a defense to an action upon it, that it is void as against public policy. (*Noble v. McGurk*, 16 Misc. Rep. 461; *Newman v. Nellis*, 97 N. Y. 285; *Ryan v. Dox*, 34 id. 307.)

The conclusion is reached that the interlocutory judgment overruling the demurrer should be affirmed, with costs, with leave to the defendants to answer within twenty days after entry and service of a copy of this order.

SPRING, J., concurred in second ground stated in opinion; HISCOCK, J., concurred in result; DAVY, J., dissented in an opinion in which WILLIAMS, J., concurred.



DAVY, J. (dissenting):

The principal question in this case is whether the contract, which is made a part of the complaint, is void as against public policy.

The effect of the contract was to control the plaintiff as a stockholder and an officer of the bank in retaining the old board of directors in office during the period of five years.

The plaintiff occupied a position of trust and confidence which required him to look only to the best interests of the corporation, but this contract placed him under obligation to vote to retain the old board of directors in office, even though it was for the best interest of the corporation to elect new directors. The defendants, in consideration of the plaintiff purchasing the fifty shares of stock and using his influence to keep the old board of directors in office, agreed to elect him cashier of said bank for five years.

A stockholder who acts with others in a matter of common interest to all has no right to secure to himself any particular profit or advantage over his associates by any secret or undisclosed agreement. (*Adams v. Outhouse*, 45 N. Y. 322, 323; *Bliss v. Matteson*, Id. 22.) It would be a fraud upon the other stockholders of the corporation.

The defendants had no power to control the business of the corporation, or to enter into a contract binding the plaintiff to exercise his influence to retain the services of the old board of directors. It appears upon the face of this agreement that it must have been made for the private advantage and benefit of the parties thereto. The defendants were evidently attempting to get control of the corporation to shape its policy and control its business. The facts are similar in many respects to the case of *Guernsey v. Cook* (120 Mass. 501.) It was there held that a contract by which a stockholder in a corporation, in consideration of the purchase of a part of his stock at a price named, agreed to secure to the purchaser the office of treasurer of the corporation with a fixed salary, and in case of his removal to repurchase the stock, was void as against public policy and was a fraud on the other members of the corporation, in the absence of evidence that the transaction was not for a private benefit of the shareholder, or that it was consented to by the other members of the corporation.

It was plainly the intent of the parties to this contract to place it

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beyond the power of the corporation for five years to change its directors, and to take from the directors the power to appoint or elect any other cashier than the plaintiff, even though he should prove unfaithful to his trust. The power to appoint and remove officers of the corporation rests with the directors and this power cannot be taken away by a contract made by any of the stockholders.

The stockholders have but few functions. All contracts of a corporation are usually made by or under the direction of the board of directors. They have the exclusive power to make corporate contracts. They appoint or elect the officers of the bank, and they can act only as a board duly notified and assembled. The members of the board cannot individually outside of the meeting make any contract that will bind the corporation, unless the contract is subsequently ratified by the board of directors. Courts do not permit stockholders or directors to trade or barter away the offices of a corporation for their own private advantage, and when such contracts are attempted to be enforced, courts have uniformly held that they were void as against public policy. (*Fennessy v. Ross*, 90 Hun, 298; 5 App. Div. 342; *Barnes v. Brown*, 80 N. Y. 527; *Bliss v. Matteson*, 45 id. 22; *Barr v. N. Y., L. E. & W. R. R. Co.*, 125 id. 274.)

The rule laid down in *Fennessy v. Ross* (90 Hun, 298) is applicable to this case. The court held that contracts entered into by directors and officers of a corporation for the purpose of trading upon, or attempting to barter away, the interests of a corporation for their private advantage are void as against public policy.

The same case came before the Appellate Division (5 App. Div. 344) upon an appeal from an interlocutory judgment sustaining a demurrer to and dismissing the amended complaint. The court said: "We are unable to see that there is any real difference between the case as it stood upon the original complaint and as it now stands upon this amended complaint. It still remains that the plaintiff was bartering away the offices of the companies and a representation in their boards of directors. It was not only a contract by which the plaintiff, as part of the consideration for the money he was to receive for his shares, agreed to make the purchaser a general manager and the vice-president of the corporation, but he also agreed to keep him there at a compensation of \$1,500 for the first year and at

a larger compensation afterwards." The court held that this contract was void as against public policy, and was a fraud on the other members of the corporation.

If stockholders are dissatisfied with any of the officers of the bank their remedy is to induce the directors to elect other officers in the manner and at the time provided by the charter. No stockholder has a right to employ officers or interfere with the management of a banking corporation, nor can the board of directors be controlled by any stockholder in the exercise of discretionary powers conferred upon them by the charter.

The affairs of a bank must necessarily be under the exclusive control of its directors, and they are required to perform the duties thereof in such a way as to promote the best interests of the stockholders. (*Cassidy v. Uhlmann*, 170 N. Y. 516.)

In *Smith v. Hurd* (12 Metc. 371, 385) the relations of stockholders to a banking corporation are stated by Chief Justice SHAW with his usual clearness and precision. He said: "Individual members of the corporation, whether they should all join, or each act severally, have no right or power to intermeddle with the property or concerns of the bank, or call any officer, agent or servant to account, or discharge them from any liability."

The power to employ the cashier and the other officers of the bank rested solely with the board of directors. The agreement, therefore, was unauthorized by the bank, and was invalid as contrary to public policy.

While it is true that the objection raised by the defendant that the contract is illegal comes with no good grace from him, it is not allowed to prevail against him on the ground that he is in the right, but for the public good, and also for the reason that the court will not lend its aid to either party to enforce a contract that is void as against public policy.

The demurrer to the complaint should be sustained, with costs.

WILLIAMS, J., concurred.

Interlocutory judgment affirmed, with costs, with leave to defendants to withdraw their demurrer and answer within twenty days after entry and service of this order, upon payment of the costs of the demurrer and of this appeal.

PORTER D. SMITH, Respondent, v. LEHIGH VALLEY RAILROAD COMPANY, Appellant. (No. 1.)

*Negligence — when the giving of a signal by bell or whistle at a railroad crossing is, as matter of law, sufficient — the jury are not to speculate as to what else should be done.*

In an action to recover damages for personal injuries sustained by the plaintiff in a collision which occurred at midnight at a railroad crossing, between one of the defendant's trains and a carriage in which the plaintiff was riding, the court submitted to the jury the question whether any signals were given by bell or whistle of the approach of the train, and further left it to the jury to say whether these signals, if given, constituted a timely warning or adequate and sufficient protection under the circumstances of the case, charging that, if they did not, the defendant was guilty of negligence.

Neither the counsel for the plaintiff nor the court suggested any other act or thing which might or should have been done by the defendant and the failure to do which the jury might find constituted negligence.

*Held*, that a judgment entered upon a verdict rendered in favor of the plaintiff should be reversed upon the ground that, under the conditions surrounding the crossing and the accident in question, it should be held, as matter of law, that if the signals were given, as claimed by the defendant, they were sufficient;

That, as the plaintiff had not suggested what other things, in addition to the signals by bell or whistle, the defendant should have done by way of giving warning of the approach of the train, the charge of the trial court was erroneous in that it permitted each juror to speculate as to what would be timely, adequate and sufficient warning and to find the defendant negligent if it did not give such warning (per WILLIAMS, J.).

APPEAL by the defendant, the Lehigh Valley Railroad Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Ontario on the 2d day of July, 1901, upon the verdict of a jury for \$8,000, and also from an order entered in said clerk's office on the 2d day of December, 1901, denying the defendant's motion for a new trial made upon the minutes.

*Martin Carey and James McC. Mitchell*, for the appellant.

*Thomas Raines and Charles F. Miller*, for the respondent.

WILLIAMS, J.:

The judgment and order should be reversed, and a new trial granted, with costs to appellant to abide event.

The action was brought to recover damages for injuries to the plaintiff alleged to have been caused by the negligence of the defendant. The injuries were received in a railroad crossing accident, which occurred about midnight of February 24, 1900, at Farmington station on the defendant's road. The plaintiff, his wife, two sons and three daughters, riding in a two-seated carriage, drawn by two horses, and driven by one of the sons, were crossing the defendant's railroad tracks. The carriage was struck by the engine of a fast express train, and the wife, the three daughters and one son were killed. The plaintiff and the son who was driving were the only survivors. An action was brought by this plaintiff, as administrator of his wife, to recover for her death in that accident. That action was tried and resulted in a verdict for the plaintiff. An appeal was taken to this court, where the judgment and order denying a motion for a new trial upon the minutes were affirmed. (61 App. Div. 46.) An appeal was taken to the Court of Appeals where the judgment and order were reversed and a new trial granted. (170 N. Y. 394.) Upon the appeal in that case, we declined to hold that the verdict was contrary to the evidence, upon the questions of defendant's negligence and the absence of contributory negligence. The Court of Appeals held that it could not be said as a matter of law that the defendant was free from negligence, or that the plaintiff's intestate was guilty of contributory negligence. The reversal by that court was for an error in the charge of the trial justice. When that case was before this court we examined and considered carefully all the evidence as to the accident and the questions of negligence on either side, and an examination of the record upon this appeal leads us to the same conclusion we arrived at in the former case. The evidence here is quite as strong in support of this verdict as the evidence in the former case was in support of the verdict therein. This court would not be justified, under the recent decisions of the Court of Appeals as to contributory negligence in these crossing accident cases, in holding that this verdict was contrary to the evidence. While we have power to afford such relief in a proper case, we must still have in mind, and be governed by, the decisions of the court of last resort as to what constitutes contributory negligence, and under what circumstances and upon what

evidence that question is within the province of the jury and is not to be determined by the court. It is in this sense that we said in the former case that the Court of Appeals had left us little to do in reviewing this question in crossing cases. The Court of Appeals reviewed the evidence in that case very fully, and expressed its opinion quite decidedly to the effect that the questions of negligence and contributory negligence were for the jury, and if we needed anything to confirm our opinion expressed in that case we could readily find it in the opinion of the Court of Appeals.

There is, however, a question involved in this appeal, which was not presented or considered in the former case when it was before us. The only ground of negligence then submitted to the jury was the failure to ring the bell and sound the whistle. The court expressly limited the issue of negligence to the failure to give these signals. In the present case the court did not so limit the issue. It submitted to the jury the issue as to the signals by bell and whistle, but it did not stop there. It further left it to the jury to say whether these signals if given constituted a timely warning or adequate and sufficient protection under the circumstances of the case, charging that if they did *not*, then the defendant was guilty of negligence, which rendered it liable in the case. Neither the counsel for the plaintiff nor the court suggested any other act or thing which might or should have been done by the defendant and the failure to do which the jury might find constituted negligence. The jury were left, each one for himself, to speculate in his own mind as to what the defendant should have done, and because that was not done, to find negligence which rendered the defendant liable. It is undoubtedly true that, under some peculiar circumstances, the usual ordinary crossing signals by bell and whistle might be held not fairly to measure the full duty of the railroad in approaching a grade crossing. Such a case was *Petrie v. N. Y. C. & H. R. R. Co.*, 63 App. Div. 475; *affd.*, 171 N. Y. 638.)

The crossing in that case was a particularly dangerous one, one as to which the rule referred to might be well applied, and was applied.

It may be doubted whether the crossing in this case was one, under the circumstances surrounding this accident, to which the rule would be applicable. It was no more dangerous in itself than

ordinary crossings. The only circumstance which rendered it peculiarly dangerous at the time in question was the atmospheric condition, the wind, the storm. Under ordinary circumstances, and at ordinary crossings, the usual signals by bell and whistle would be the full measure of the duty of the railroad company in giving warning of the approach of a train to a crossing. I am not prepared to say that the crossing and the circumstances attending the accident in question were not such as to permit the application of the rule laid down in the *Petrie* case, and that the jury were not authorized to find that the defendant failed to perform its full duty of giving warning of the approach of this fast express to the crossing, even though it gave the usual signals by bell and whistle. The more serious question is whether the court submitted that question to the jury in a proper way. It would not do to say to a jury that it was the duty of a railroad company to give timely, adequate and sufficient warning of the approach of its train to a crossing, and if it did not do that it was guilty of negligence; that would leave the jury to speculate, each man for himself, as to what was timely, adequate and sufficient warning, and some or all of the jury might well base a verdict upon something which if known to the court would be held improper. The ordinary rule has always been to suggest what warning the plaintiff claimed should have been given and leave it to the jury to say whether it was necessary to give that warning, and whether in fact it was given. And this rule has ordinarily been applied to the signals by bell and whistle. When it is claimed these signals are inadequate and insufficient, under the peculiar circumstances of any case, then certainly the plaintiff should suggest what other things should have been done by way of giving warning, and the jury should then have been left merely to say whether the things suggested should have been done and whether they were in fact done. The rights of the parties would then be fully protected, and only proper questions would be passed upon by the jury. Under a general charge such as was given in this case, that the jury might say whether the defendant performed its full duty by way of warning, even if it gave the usual signals by bell and whistle, without any suggestion as to what it was claimed the defendant had still left undone, the jury were left to speculate, to conceive in their own individual minds, of any fanciful or ridicu-

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lous warning that the defendant should have given, and because it did not give that to find negligence was established.

I do not think this distinct question was passed upon in the *Petrie* case. When that case was before this court the prevailing opinion expressly stated that the exception by the defendant was not sufficiently explicit to fairly raise this question, and that the charge in its entirety was not open to this criticism. The Court of Appeals affirmed that case without opinion, and we may well assume their decision was made without passing upon this question. It seems to me the Court of Appeals never have held such a general charge proper, and will never do so, when the question is properly before it. The question is not so pointedly presented in this case as it might have been, but I think it is sufficiently raised to require us to pass upon the propriety of this form of presentation to the jury, and for error in this regard the judgment should be reversed and a new trial granted, with costs to appellant to abide event.

McLENNAN, SPRING and HISCOCK, JJ., concurred in result, upon the ground that, under the conditions surrounding the crossing and accident in question, it should be held, as matter of law, that if the signals were given, as claimed by the defendant, they were sufficient; DAVY, J., not sitting.

Judgment and order reversed and new trial ordered, with costs to the appellant to abide the event, upon questions of law only, the facts having been examined and no error found therein.

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PORTER D. SMITH, Respondent, v. LEHIGH VALLEY RAILROAD COMPANY, Appellant. (No. 2.)

*Additional allowance of costs — an action to recover for personal injuries in a collision at a railroad crossing is not extraordinary.*

An action to recover damages for personal injuries, sustained in a collision at a railroad crossing, may be difficult, but cannot be said to be extraordinary, and, consequently, an extra allowance of costs cannot be granted in such an action. (Code Civ. Proc. § 8253.)

APPEAL by the defendant, the Lehigh Valley Railroad Company, from an order of the Supreme Court, made at the Monroe Special



Term and entered in the office of the clerk of the county of Ontario on the 2d day of July, 1901, granting the plaintiff an extra allowance of \$400, that sum being five per cent of the verdict of \$8,000 recovered by the plaintiff.

The action was brought to recover damages for personal injuries sustained by the plaintiff in consequence of a collision at a railroad crossing between one of defendant's trains and a carriage in which the plaintiff was riding.

*Martin Carey and James McC. Mitchell*, for the appellant.

*Thomas Raines*, for the respondent.

WILLIAMS, J. :

The order should be reversed, with ten dollars costs and disbursements, and the motion denied, with ten dollars costs.

In order to authorize the granting of an extra allowance, a case must be both difficult and extraordinary. (Code Civ. Proc. § 3253.)

While a railroad crossing accident case may be difficult and require much labor and expense in the trial, such a case cannot be said, in any sense, to be extraordinary. Cases of this kind are very common. Our courts are continually trying them and reviewing them on appeal.

Extra allowances should not be granted in these cases, unless they come clearly within the provisions of the statute.

The verdicts are ordinarily large enough, and create a sufficient burden upon the railroads, without granting extra allowances. In this case the plaintiff is adequately compensated in the verdict and the statutory costs.

The order should, therefore, be reversed, with ten dollars costs and disbursements, and the motion denied, with ten dollars costs.

MCLENNAN, SPRING and HISCOCK, JJ., concurred ; DAVY, J., not sitting.

Order reversed, with ten dollars costs and disbursements, and motion denied.

SARAH A. SHERMAN, Appellant, v. CAROLINE A. ALLISON,  
Respondent.

*An assignment by a husband of a policy of insurance issued on his life for his wife's benefit is a consent to the wife's assignment thereof.*

Chapter 248 of the Laws of 1879, requiring the written consent of a husband to an assignment by his wife of a policy of insurance issued upon the husband's life for the benefit and use of the wife, is satisfied where the husband, contemporaneously with the assignment by the wife and as a part of the same transaction, executes a separate assignment of the policy to the assignee on the same sheet of paper which contains the assignment from the wife.

APPEAL by the plaintiff, Sarah A. Sherman, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of Onondaga on the 12th day of April, 1902, upon the decision of the court, rendered after a trial at the Onondaga Special Term, awarding to the defendant the proceeds of a certain policy of life insurance.

*Benjamin Stolz*, for the appellant.

*Albert P. Fowler*, for the respondent.

Judgment affirmed, with costs, on opinion of MERWIN, J., delivered at Special Term; McLENNAN, SPRING, WILLIAMS and DAVY, JJ., concurred; HISCOCK, J., not sitting.

The following is the opinion of MERWIN, J., delivered at Special Term:

MERWIN, J.:

On the 30th day of May, 1867, the Connecticut Mutual Life Insurance Company issued its policy of insurance upon the life of Jireh Sherman in the sum of \$5,000, for the sole use of the plaintiff, his wife, payable at his death to his wife if she survived him; if not, then to her children. The annual premium to be paid was \$166. On the 26th day of May, 1899, Jireh Sherman died. In January, 1900, the plaintiff commenced an action against the insurance company for the recovery of the amount of the policy. Thereafter, upon the allegation that this defendant claimed to own

the policy and the moneys payable thereon, such proceedings were had that the insurance company paid into court the proceeds of the policy, being the sum of \$4,858.56, and Caroline A. Allison was substituted as defendant in place of the company. The claim of this defendant is that, by virtue of assignments made by the plaintiff and by Jireh Sherman on the 10th day of October, 1879, to George F. Comstock and by him to this defendant in December, 1882, and on June 26, 1889, she is the owner of the policy and the moneys in controversy.

It appears that on October 10, 1879, the plaintiff, by an instrument in writing, signed by her and dated, and duly acknowledged that day, for value received, transferred all her right, title and interest in the policy to George F. Comstock. On the same day Jireh Sherman, by an instrument in writing, signed by him and bearing the same date and duly acknowledged by him on that day, in consideration as therein expressed of \$1,428.88 to him paid, transferred all his right, title and interest in the policy to George F. Comstock. These instruments are on the same paper, are acknowledged before the same notary, and their execution and delivery must, I think, be assumed to have been part of one and the same transaction. The consideration stated as \$1,428.88 appears to be the amount of the cash premiums paid on the policy up to that date.

The assignee, George F. Comstock, by verbal transfer in December, 1882, and by written transfer on June 26, 1889, transferred the policy to the defendant, and since the transfer from the plaintiff and her husband to the said George F. Comstock the latter or the defendant have paid or caused to be paid all the premiums upon the policy.

By chapter 248 of the Laws of 1879 it is provided as follows: "All policies of insurance heretofore or hereafter issued within the State of New York upon the lives of husbands for the benefit and use of their wives, in pursuance of the laws of the State, shall be, from and after the passage of this act, assignable by said wife with the written consent of her husband; or in case of her death by her legal representatives, with the written consent of her husband, to any person whomsoever, or be surrendered to the company issuing such policy, with the written consent of the husband."

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The main question in this case is, whether the written transfer from the husband to Comstock was in effect a written consent to the transfer from the wife to Comstock, within the meaning of the statute?

The statute does not state in what manner the consent shall be given. It does not require that the husband shall join in the transfer. If he in fact does join with the wife in a written assignment that is a sufficient consent to meet the requirements of the statute. (*Anderson v. Goldsmidt*, 103 N. Y. 617.) In the case cited the form of the assignment executed by the husband and wife was: "We, Barbara and Joseph Goldschmidt† \* \* \* hereby assign, sell, set over, and deliver to said John Anderson all our right, title and interest in and to said policy."

So that if the husband and wife join in transferring all their right, title and interest in the policy that is enough. The husband by a transfer of his interest does not in terms consent that the wife may transfer her interest, but the act is such that, as said in the *Anderson* case, the purpose of the statute is thereby fully answered.

In the present case the assignment of the husband is separate from that of the wife. It is, however, part of the same transaction and executed and delivered at the same time as that of the wife. Upon the paper upon which both assignments are written there first appears a description of the policy and a statement of the premiums paid, and each assignment refers to this description, the one by the expression, "the above-described policy," and the other by the expression, "the foregoing policy."

These assignments, being part of one and the same transaction, should be read together, and if so they are together just as forceful as the assignment in the *Anderson* case and answer just as fully the purpose of the statute.

Upon the face of the papers the husband received from Comstock substantially the full value of the policy. He intended, if honest, that Comstock should have an operative transfer. So that if the intent of the husband is the test, his transfer should be construed to be a written consent.

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† *Sic.*

The logic of the *Anderson* case leads directly, I think, to the conclusion that there is here a sufficient written consent.

The *Anderson* case is not overruled or limited by the case of *Dannhauser v. Wallenstein* (169 N. Y. 199). The cases of *Slocomb v. Ray* (123 N. C. 571) and *Davidson v. Cox* (112 Ala. 510), cited by the counsel for plaintiff, involved the construction of statutes unlike the one applicable to this case.

It follows that the defendant is entitled to the fund.

Findings or decision in short form may be submitted.

**Cases**  
DETERMINED IN THE  
**FIRST DEPARTMENT**  
IN THE  
**APPELLATE DIVISION,**  
**December, 1902.**

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**HENRY SUNDHEIMER, Appellant, v. THE CITY OF NEW YORK,**  
**Respondent.\***

*Negligence—duty of a city in regard to the construction and maintenance of a sewer.*

All that is required of a municipal corporation when building a sewer is, that it shall adopt a plan of construction which is reasonably calculated to meet the needs of the present and those of the future so far as they can be reasonably anticipated. If it performs this duty and thereafter properly maintains such sewer, it is not liable for injuries to property resulting from the overflow of the sewer occasioned by a rain storm of extraordinary violence.

What evidence is insufficient to warrant a finding that an overflow of a sewer was due to negligence in the construction of the sewer or in its subsequent maintenance, considered.

O'BRIEN and HATCH, JJ., dissented.

APPEAL by the plaintiff, Henry Sundheimer, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of New York on the 15th day of January, 1902, upon the verdict of a jury rendered by direction of the court, and also from an order entered in said clerk's office on the 11th day of February, 1902, denying the plaintiff's motion for a new trial made upon the minutes.

*Jacob Friedman*, for the appellant.

*Theodore Connolly*, for the respondent.

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\* This case was decided at the November term but the opinion was handed down too late to be published with the other opinions of that term.

McLAUGHLIN, J. :

On the 24th of August, 1901, certain personal property belonging to the plaintiff was injured by the overflow of a sewer which extended past his premises, and this action was brought to recover from the defendant the damages sustained, upon the ground that the same were caused by the negligence of the city of New York in the construction and maintenance of the sewer.

The answer denied defendant's liability and alleged as an affirmative defense that whatever damages were sustained by the plaintiff were the result of a storm of unusual severity "which the defendant had no reason to anticipate and was helpless to guard against."

At the conclusion of the trial a verdict was directed for the defendant, and from the judgment thereafter entered plaintiff has appealed. The damages sustained by the plaintiff by reason of the overflow of the sewer were not litigated at the trial, the defendant there stipulating that the plaintiff was in fact injured to the amount of \$300. The fact, however, that the plaintiff sustained damage did not, in and of itself, entitle him to recover the same from the city. To entitle him to such recovery he was obligated to prove the other facts alleged in the complaint, viz., that the overflow was due to the negligence of the city in the construction of the sewer in the first instance, or its maintenance thereafter. The evidence adduced upon the trial failed to establish either one of these essential facts. First, as to the construction of the sewer. It appeared that it was built according to a well-recognized and approved plan, and, according to the testimony of plaintiff's own expert, when completed was considered by the best engineers in the city a "good sewer," and in this he was corroborated by defendant's experts. According to their testimony the sewer was constructed according to a recognized formula for the construction of sewers. By this formula the area to be drained was ascertained and the capacity of the sewer calculated upon the theory of a possible rainfall of one inch per hour within that territory, and also what had been or might be built upon territory in the locality to be drained by the sewer. Taking into consideration all of these facts, the sewer is "sufficient in capacity to carry off the ordinary rain that will fall, namely, one inch per hour in that watershed district." In this connection it is worthy of note that at a

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certain stage of the trial the plaintiff's attorney conceded — though the concession was afterwards withdrawn — that the sewer was properly constructed "as far as the knowledge of engineering at that date went." Therefore, as to the construction, there was absolutely no evidence offered upon the trial which would have justified a finding to the effect that the city was negligent in any respect, either as to the location, construction or outlet of the sewer. Its liability to the plaintiff, if it be liable at all, must, therefore, be based upon its negligence so far as the same related to the maintenance of the sewer after it had been constructed, and upon this branch of the case plaintiff also failed. What the plaintiff attempted to prove was that the sewer was of insufficient capacity; that the defendant had neglected to clean it; that dirt had been permitted to accumulate in it, which diminished its capacity to a large extent, and, by reason thereof, the overflow was caused. The testimony of some of plaintiff's witnesses tended to show that the sewer had overflowed on different occasions; that they had not seen it cleaned — but, as against this, the testimony of plaintiff's own witness, Mulcahy, showed that it was cleaned within a few days after a storm which occurred on the fifth of July preceding the one which occurred on the twenty-fourth of August, when plaintiff sustained his damage — while defendant's witness, Byrne, whose duty it was to examine and clean the sewer, including the receiving basins, etc., in that section of the city, testified that the same was cleaned in front of plaintiff's premises on March 26, 1901, and also on the tenth of July following. There was also testimony to the effect that the sewer was, from time to time, thoroughly inspected and cleaned. The negative testimony, therefore, of some of plaintiff's witnesses to the effect that they had not seen the city authorities clean the sewer was overcome by the positive, affirmative evidence of the witnesses referred to, to the effect that the sewer was in fact cleaned.

What caused the sewer to overflow at the time in question is apparent. There was, on that day, a very severe storm — the severity of which, according to the testimony of one of the defendant's witnesses, had been exceeded by only four storms in over thirty years — a storm in which over an inch of water fell the first hour and nearly two inches and a half in six hours. Loose earth, rubbish, etc., were carried into the receiving basins, which, during the



early part of the storm, became clogged, and thereafter the water, being unable to escape through them into the sewer, was carried into the basements, cellars and houses located along its line. There is no doubt that the plaintiff was injured, as doubtless many others were, but the defendant was not responsible for it; it was not bound to anticipate a storm of this character. All that was required of it, when it built the sewer, was that it should adopt a plan that was reasonably calculated to subserve the needs of the present and those of the future so far as they could be reasonably anticipated, and to thereafter properly care for it. This it did so far as appears from this record.

Stress is laid by the appellant upon *Talcott v. City of New York* (58 App. Div. 514). There this court held where a sewer overflowed, that, in the absence of facts showing the cause, a burden was cast upon the city to explain. Here the city assumed that burden and established by uncontradicted evidence the cause of the overflow, viz., a storm of unusual severity. The case of *Seifert v. City of Brooklyn* (101 N. Y. 136) is clearly distinguishable from this one. No evidence whatever was offered which would have justified a finding that the sewer was not, as already said, properly constructed, or that it was not thereafter properly maintained, including the receiving basins and outlets. Where a municipality has thus constructed and maintained a sewer adequate for all ordinary purposes, it is not liable for injuries caused by an extraordinary storm of the character of the one which occurred at the time stated in the complaint. A man of ordinary prudence and good judgment would not be required to anticipate such a storm, and certainly no more can be required of the city than could be of him.

The judgment appealed from must, therefore, be affirmed, with costs.

VAN BRUNT, P. J., and INGRAHAM, J., concurred; O'BRIEN, J., dissented.

O'BRIEN, J. (dissenting):

I dissent from the conclusion reached by the majority of the court in this case that the plaintiff failed to present evidence from which the inference of negligence might be drawn in respect to the construction and maintenance of the sewer which caused the over-

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flow on the 24th of August, 1901. It is proper, therefore, to briefly summarize the evidence given at the trial which, in my opinion, required a submission to the jury of the issues of fact instead of a direction of a verdict in defendant's favor by the court.

The premises occupied by the plaintiff are on One Hundred and Sixty-ninth street at Washington avenue and in what is known as the Mill brook watershed. To drain this territory the Brook avenue sewer running from One Hundred and Sixty-fifth street to the Bronx Kills was constructed in 1879. This sewer was subsequently extended to Webster avenue and thereafter continued up Webster avenue to One Hundred and Eighty-fourth street and from thence further continued to Mosholu parkway, and thence in 1899 to Two Hundred and Fifth street, with branches to the west. A temporary sewer was then built to the east connecting with the Williamsbridge system which is largely beyond the Mill brook watershed. Meanwhile the One Hundred and Sixty-ninth street sewer, leading into Webster avenue past the plaintiff's premises from Franklin avenue to the east, was constructed. Although these branches and additional sewers were for the most part within the district which the Brook avenue sewer had been constructed to drain, the sewers were all designed, besides the surface water, to carry off waste water from the houses. As testified by the defendant's engineer: "There have been a great many houses built there; quite a number, and every house that is built up has a number of water-closets and sinks and cesspools and drains which connect with the sewers, and all of these drain into the Webster Avenue sewer, and all the time from 1872 down, there have been constant additions to the burden that the Webster Avenue sewer has to carry off." In this connection it was testified that there were other overflows prior to August 24, 1901, and many complaints were made to the officials, and the defendant's engineer admitted that he had received complaints as far back as the latter part of 1896. One witness testified that she had herself made six or eight complaints, one having been five years ago, and that the sewer basins became stopped upon occasions of ordinary storms—even slight storms she had seen that—and carried away no water. Another witness testified that there had been overflows in January, 1901, on July 5, 1901, and on August 24, 1901; and it was

further testified that in November, 1900, and March and April, 1901, there were overflows. Finally, testimony showing notice to the city was excluded on the ground that it was cumulative, the court stating that defendant's counsel admitted as matter of law that the city had sufficient notice.

More particularly with regard to the cause and the character of the overflow in question, it was testified that in a few moments after the rain began the water overflowed into the basement, the street was covered with water, the closets, sinks and drains backed up and ran over, the water being muddy and full of sticks and debris. And a manhole in the street at this point blew open and water spouted three or four feet in the air. One witness, who had examined the basin at the time, said it was full of mud and slush up to within a foot of the top and that prior thereto and back as far as April, 1901, he had seen this basin clogged up with mud up to a foot and a half of the top and that he had taken off the top to get balls for the boys who played there in the street and stood on the top of the mud which was hard and dry, and this was a constant occurrence all through the summer, and the basin at the time of the storm did not act at all. Upon this subject an engineer testified for the plaintiff that anything above two feet in the basin would retard the flow, and if it extended to within a foot of the top it would stop the flow entirely. Another witness testified that ever since the basins were built they have been a source of annoyance, and the buildings have twice filled up with water prior to July 5, 1901, and from ten years ago she had seen the basins refuse to carry water three or four times a season. The director of the meteorological observatory of Central Park testified that the rainfall on August twenty-fourth was altogether two and forty-seven one-hundredths inches, of which one and eight one-hundredths fell between one and two o'clock, which was not as hard as the storm July 5, 1901; and that there are storms on record heavier and longer, notably September 22, 1882; and an examination of the records of the observatory shows that during the last thirty-one years there have been forty-two storms where the precipitation has exceeded one inch per hour, for which it was testified the Brook avenue sewer was constructed to provide. It further appears that since August 24, 1901, more adequate provision has been made for the drainage of this locality.

We have not overlooked the evidence given in behalf of the city and which is set forth in detail in the opinion of Mr. Justice McLAUGHLIN, that there had been constant inspections, and that a short time prior to the storm which did the damage the basins had been cleaned. This, however, was not conclusive, because on the question of the credibility to be attached to the witnesses whose testimony was thus opposed we have the actual occurrence at the time of the storm showing that the sewer was insufficient, that it did not carry off the water, and that this was so not alone because the storm was one of unusual severity, but, if the testimony of the plaintiff is to be believed, because the sewer at that time was clogged and had placed upon it a burden in the shape of all these lateral sewers greater than its capacity. We do not claim, on the other hand, that the testimony showing that the sewer was clogged and was insufficient is conclusive; but we do think that there were presented questions of fact, first, as to whether it was the part of prudent management to add to the original area which the sewer as constructed was intended to drain; and also as to whether, if reasonable care had been exercised in inspecting and keeping the basins cleaned, they would have been in the condition testified by the witnesses on the day of the storm.

In other words, upon the entire evidence, I think there were questions of fact for the jury as to whether it was negligence of the defendant to add the new sewers to the old one and to disregard the complaints and fail to remedy the defects, and whether the city had negligently permitted the basins to be and remain clogged and useless. Even though it be conceded that the original construction of the sewer was sufficient, there was evidence to justify the inference that the burdens further imposed upon it by extending the area which it was to drain and by making other lateral connections which increased the quantity of water and sewage to be carried off rendered it entirely insufficient, as shown by the frequent occasions when it overflowed, resulting in the numerous complaints to the city authorities, which, as admitted on the trial, brought home notice to them of its insufficiency. I think the facts bring the case within the rule laid down in *Seifert v. City of Brooklyn* (101 N. Y. 136), where, as here, there was evidence sufficient to justify the inference that the city had failed to provide proper and efficient drain-

age, and the judgment dismissing the complaint was accordingly reversed.

I think, therefore, that the judgment appealed from should be reversed, and a new trial ordered, with costs to the appellant to abide the event.

HATCH, J. (dissenting):

I think the judgment in this case should be reversed on the ground that upon the evidence a question of fact was presented for determination by the jury as to whether the defendant was guilty of negligence in failing to exercise reasonable care in inspecting and cleaning the sewers which overflowed, and whether the damages which the plaintiff sustained were occasioned by such neglect. Upon this subject I concur in the opinion of Mr. Justice O'BRIEN.

Upon the other question the proof seems to be insufficient to show any negligence, sufficient to support a verdict for the plaintiff, in the plan and construction of the sewer, or in the burdens which have been placed upon it since its construction.

Judgment affirmed, with costs.

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UNION TRUST COMPANY OF NEW YORK, as Executor of and Trustee under the Last Will and Testament of ANDREW JEFFRIES GARVEY, Deceased, Respondent, v. JOHN OWEN and Others, Appellants, Impleaded with NEW YORK PRESS CLUB, Respondent, and ST. LUKE'S HOSPITAL and Others, Defendants.

*A construction which makes an instrument valid preferred to one which makes it invalid.*

Where an instrument is capable of two constructions, one of which will render it valid and the other invalid, the court will adopt the former construction in preference to the latter.

APPEAL by the defendants, John Owen and others, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 13th day of May, 1902, denying said defendant's motion to amend the judgment theretofore entered in the action.

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*James M. Gifford*, for the appellants.

*Hoffman Miller*, for the plaintiff, respondent.

*Charles Maitland Beattie*, for the respondent, New York Press Club.

PER CURIAM:

We are of the opinion that the order appealed from should be affirmed. When the agreement is read and considered as a whole it is clear that the parties to it intended that there should be a distribution of the fund referred to at and immediately following the death of Mrs. Garvey, and the income on this fund, which was directed to be paid to the Owens, was only to be paid during her life. This construction not only gives effect to the provision of the agreement which directs a distribution upon Mrs. Garvey's death, but it also makes the agreement a legal one, while the construction contended for by the appellants would make it illegal, inasmuch as it unlawfully suspends the power of alienation. This must have been so held by the referee, otherwise he would not have reached the conclusion that the agreement was a valid one. The general rule is that where an instrument is subject to two constructions, one of which would make it valid and the other invalid, the court will adopt the former in preference to the latter. (*Post v. Hover*, 33 N. Y. 593; *Greene v. Greene*, 125 id. 512; *Locke v. F. L. & T. Co.*, 140 id. 149; *Roe v. Vingut*, 117 id. 204.)

The order appealed from is affirmed, with ten dollars costs and disbursements.

Present — VAN BRUNT, P. J., PATTERSON, O'BRIEN, McLAUGHLIN and LAUGHLIN, JJ.

Order affirmed, with ten dollars costs and disbursements.

**BENJAMIN P. BENJAMIN, Respondent, v. THE CITY of NEW YORK, Appellant.**

*Services of a commissioner of deeds, employed by the city of New York, who takes affidavits to accounts of employees of the city — when he is not entitled to compensation, beyond his salary, from the city.*

A clerk, employed at a fixed annual salary, in the bureau of highways of the city of New York, cannot recover compensation from the city for services rendered by him as a commissioner of deeds in taking the affidavits of certain employees of the department of public works to accounts presented by them, where it appears that he rendered such services, either believing them to be a part of his clerical duties or expecting compensation only from those who made the affidavits.

APPEAL by the defendant, The City of New York, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 19th day of May, 1902, upon the verdict of a jury, and also from an order entered in said clerk's office on the 23d day of May, 1902, denying the defendant's motion for a new trial made upon the minutes.

*Chase Mellen*, for the appellant.

*Isidore S. I. Chirurg*, for the respondent.

PATTERSON, J. :

The plaintiff was a clerk in the bureau of highways of the city of New York, and was also a commissioner of deeds, authorized as such to take affidavits and acknowledgments. As a clerk in the bureau he received a fixed annual salary. Between the 15th day of December, 1895, and October 5, 1901, he, as a commissioner of deeds, took affidavits of certain employees of the department of public works, namely, inspectors upon public work, those affidavits being required in verification of the accounts presented by such inspectors as to the number of days work performed by them.

When the plaintiff entered upon his employment as a clerk, which was before the year 1890, he found it was the custom of clerks in the bureau to take affidavits of the character named, and thereupon he applied for an appointment as a commissioner of deeds. He

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took the affidavits at the request of the superintendent of the bureau. He never gave a thought, as he expresses it, to being compensated, thinking that the taking of the affidavits was a part of his duties. Sometime in 1890 he had a conversation with Mr. Dean, who was the superintendent of street improvements, and stated to him that there were other people in the office who were getting paid by the inspectors for taking affidavits in the office, that is, being paid by each inspector when he swore to the affidavit, and he asked Mr. Dean if he could not get that compensation from the inspectors. Mr. Dean said "no," but that he would speak to the commissioner about it, but nothing resulted from that conversation. The plaintiff did not at that time ask that the city pay for the affidavits.

A commissioner of deeds is entitled to collect twelve cents for every affidavit taken by him, but the plaintiff never expected compensation from the city and never supposed that there was any liability upon the part of the city to pay him for these affidavits until after the decision of the case of *Merzbach v. Mayor* by the Court of Appeals in May, 1900 (163 N. Y. 16), which inspired the institution of this action. It was held in that case that, the office of notary public being not incompatible with the subordinate position of a messenger or librarian in the district attorney's office, a person holding those two positions might recover the statutory fees to which a notary public was entitled for taking affidavits, notwithstanding his receipt of salary connected with his other position, unless he had waived his right thereto, either expressly or impliedly; and it was further held that, where such person brought his action to recover the fees as notary public and a defense was interposed that the services were rendered voluntarily, with no agreement that they were to be paid for, the burden of proof was on the defendant to establish an agreement or understanding that the notary's services were rendered gratuitously. It appeared in the *Merzbach* case that, when the services were rendered by the notary to the district attorney, the latter was expressly notified that compensation would be claimed for such services. In the case at bar it is evident that the plaintiff contemplated and intended that his services as a commissioner of deeds in taking affidavits should be in accordance with the custom of the bureau in which he was employed, and he sought an appointment as commissioner of deeds in order that he



might perform that service precisely as other clerks in that bureau did.

There is nothing in this case to show that taking the affidavits of the inspectors was to be done at the expense of the city. On the contrary, the plaintiff's own evidence establishes that it was the inspectors themselves, the affiants, who paid for the affidavits. Those affidavits were necessary to complete vouchers to be furnished by them, and whatever payment was made for taking the affidavits or certifications was made by the inspectors themselves. All the plaintiff desired was that he might receive compensation for taking those affidavits in the same way in which other clerks received it, that is, to be put on an equal footing with them. From that circumstance, in connection with the manner in which the business was transacted in the bureau, the inference is fully justified that the plaintiff took these affidavits because he thought it was part of his clerical duty, or that, if he were entitled to compensation at all, it was to be made by the affiants, whose duty it was to present their vouchers in such shape as would make them acceptable to those charged with auditing or paying them. The services were rendered to the affiants and not to the city, and the proof is that they were rendered without the slightest expectation of the city being responsible for the fees.

Where it thus plainly appears that the plaintiff rendered service, either believing it to be part of his clerical duty or expecting compensation only from those who made the affidavits, he must be regarded as having acted upon that understanding only. It is not a question of waiver of a right which he had to statutory fees, but of his willingness and of his intention to perform the service without looking for any compensation, unless he received it from the inspectors.

In this case the learned judge charged the jury that the burden was upon the defendant to prove by a preponderance of evidence that there was an agreement between the plaintiff and the city that the plaintiff was to have no compensation for taking those affidavits, which, of course, meant any compensation from the city. We think, in this case, that was shown on the plaintiff's own proof, and that the complaint should have been dismissed.

Without considering the question as to the authority of the offi-

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cers of the bureau in which the plaintiff was a clerk to employ a notary public, or to incur an indebtedness for the city on such employment, we think, for the reasons assigned above, that the judgment and order should be reversed and a new trial ordered, with costs to appellant to abide the event.

O'BRIEN, McLAUGHLIN and LAUGHLIN, JJ., concurred.

VAN BRUNT, P. J. (concurring):

I concur in the result. I am of the opinion that the plaintiff, being an employee of the city, could make no charge for work done even for the city in office hours.

I think that another reason why there can be no recovery in this case is that there is no evidence whatever that any person in the bureau of highways could incur any such obligation on the part of the city.

Judgment and order reversed, new trial ordered, costs to appellant to abide event.

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SAMUEL EMERY, Appellant, v. JOHNSTON L. DE PEYSTER, Respondent

*De facto corporation—what proof of its existence is insufficient to establish the liability of a director for its debts.*

In order to establish the existence of a *de facto* corporation it is necessary to show not only that there is a law under which the corporation might be organized and an attempt to organize it, but that corporate powers have been exercised, *i. e.*, that the corporation has exercised its particular franchise by doing business under it.

A certificate of incorporation which recited that the object of the corporation was "to do a general publishing and printing business," was filed in the Secretary of State's office December 21, 1899, but the incorporation was defective because no certificate was filed in the office of the clerk of the county of New York, which was the place at which the corporate business was to be conducted. December 22, 1899, the board of directors held a meeting at which the sole business transacted was the election of officers and the passage of the following resolution;

"Whereas it is necessary for the welfare of the company to acquire certain rights now owned by Raymond L. Donnell in order to enter into business, it is hereby Resolved, that the proper officers be and are hereby authorized and instructed to issue to said Raymond L. Donnell one thousand dollars in cash

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and nineteen hundred shares of the capital stock of this company in full payment for his entire interest in the publication known as the 'Railway News.' " No action was taken pursuant to the resolution prior to January 1, 1900, nor did the corporation transact any other business prior to that time.

*Held*, that a *de facto* corporation did not exist prior to January 1, 1900, and that a director of the corporation could not be held liable for a debt thereof because of the failure to file an annual report in January, 1900.

APPEAL by the plaintiff, Samuel Emery, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of New York on the 1st day of March, 1902, upon the dismissal of the complaint after a trial before the court and a jury at the New York Trial Term.

*Dean Emery*, for the appellant.

*William H. Wood*, for the respondent.

PATTERSON, J. :

The plaintiff sued to enforce against the defendant the statutory liability of a director of a corporation for the non-filing of an annual report in January, 1900. The allegation of the complaint is that the defendant, from May to November of the year 1900, was a director and president of the corporation, and that the plaintiff in July, 1900, was employed by that corporation to render certain services to it, and that he was wrongfully discharged and suffered damages by reason of such discharge. The defendant admits that he was a director and president of the corporation from May to November, 1900, and that no report was filed of the affairs of the company in 1900. The plaintiff did not charge specifically that the corporation was in existence on the 1st of January, 1900, and upon the trial he was allowed to amend his complaint by alleging incorporation prior to January 1, 1900, and the defendant was allowed to amend his answer by denying such incorporation prior to January 1, 1900.

It appeared in evidence that a certificate of incorporation was filed with the Secretary of State of the State of New York on the 21st of December, 1899, but no certificate was filed in the office of the county clerk of the county of New York, which was the place at which the corporate business was to be carried on. The incorporation, therefore, was incomplete. Thereupon the plaintiff undertook to prove that a *de facto* corporation existed prior to Jan-

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uary, 1900. He showed an attempt to incorporate under a general law by filing a certificate with the Secretary of State and then made the effort to prove acts of user, such as would establish the existence of a *de facto* corporation. The only evidence offered on that subject is contained in the minutes of a meeting of the board of directors of the corporation held December 22, 1899, the day after the certificate of incorporation was filed in the office of the Secretary of State. In those minutes it is stated that the incorporation papers as presented by the attorney for the company were accepted and filed in its office. Upon motion, duly seconded, the election of officers was proceeded with and a president, vice-president, secretary and treasurer were elected. Then the following resolution was passed: "Whereas it is necessary for the welfare of the company to acquire certain rights now owned by Raymond L. Donnell in order to enter into business, it is hereby, Resolved that the proper officers be and are hereby authorized and instructed to issue to said Raymond L. Donnell one thousand dollars in cash and nineteen hundred shares of the capital stock of this company in full payment for his entire interest in the publication known as the 'Railway News.' There being no further business, the meeting adjourned."

The purpose for which the corporation was to be formed was "to do a general publishing and printing business." There is no evidence of any business act done by the corporation prior to January 1, 1900, in furtherance of that purpose. All that was done at the meeting of the board of directors was preliminary to beginning business. An organization of the corporation was effected and the purpose to do business was indicated, but there is no proof to show that the thousand dollars was ever paid to Donnell or the shares of stock issued to him, or that any executed contract was made with him or any one else. Nor is there one word of proof of any business transaction being had by the corporation during the year 1899. There was merely preparation for business and nothing more. That it did not begin to do business until March, 1900, is affirmatively shown in the testimony of Brooks, the vice-president.

To make proof of the existence of a *de facto* corporation, it is necessary to show not only that there is a law under which the corporation might be organized and an attempt to organize it, but that corporate powers have been exercised. That is, that the corpora-

tion has exercised its particular franchise by doing business under it. In *Methodist Episcopal Union Church v. Pickett* (19 N. Y. 482) it is said that where there is a valid law under which a corporation may exist and the record shows a *bona fide* attempt to organize under it, very slight evidence of user beyond that is necessary, but none of the cases to which our attention has been called holds that the mere organization of the corporation by the election of officers and the passage of resolutions by directors relating to contracts purely executory in their nature, constitute acts of user of the franchise. That was held even of acts of a *de jure* corporation. In *Kirkland v. Kille* (99 N. Y. 390) the action was brought against defendants, trustees of the Globe Smelting Company, to recover a debt of the company on the ground that the defendants had failed to make and file an annual report for the year 1876, as required by the General Manufacturing Act (Laws of 1848, chap. 40, § 12, as amd. by Laws of 1875, chap. 510). There, the company was fully organized for the purpose "of carrying on a mining, smelting and metallurgical business, to accumulate, conduct and supply water for mining purposes." The whole capital stock was issued in payment of mining property, smelting works and real estate; officers were elected and their salaries fixed and the directors resolved to issue bonds to be secured by mortgage on the entire property of the company. At another meeting of the directors, it was resolved that immediate action was required to protect the property of the company and pay expenses already contracted on that account. In commenting upon these facts, the court said: "Not only was there no evidence that any other than formal acts were performed by the company in furtherance of the objects of its organization, but it was proven without contradiction 'that it never got into business;' 'that it never conducted or carried on a mining, smelting or metallurgical business, or that of accumulating, storing or conducting a supply of water for mining purposes.' In short, 'that it never performed any part of the business for which it was incorporated.' The bonds were not negotiated, and even the preliminary work of examination of the property by the consulting engineer, and 'assessment work,' that is, work done on the claim to protect the title, ceased in the early part of 1875. 'It never dug out any ore with a view to smelting.' The last of any kind was in June, 1875. There

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was at no time a superintendent. Under these circumstances we think no report in 1876 was required from the company. It never had the material capacity to do business. Even its effort to acquire it ceased and its intention to do so was given up in 1875."

We are of the opinion in this case that there was no user prior to the 1st of January, 1900; that a *de facto* corporation did not exist prior to that date, and, hence, the provisions of the statute requiring the filing of an annual report, which provisions are highly penal in their nature, are not applicable in this case and that the complaint was properly dismissed.

The judgment appealed from should be affirmed, with costs.

VAN BRUNT, P. J., INGRAHAM, HATCH and LAUGHLIN, JJ., concurred.

Judgment affirmed, with costs.

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THOMAS A. HEALY, Respondent, v. JANET T. MALCOLM, as Executrix, etc., of JAMES F. MALCOLM, Deceased, Appellant.

*An unanswered letter, written by the assignor of a claim for the use of a cottage and stable, stating the claim, is not competent proof in an action by the assignee to recover the amount due from the debtor — effect of a failure to answer it.*

In an action brought against the executrix of a decedent to recover upon a contract made by the plaintiff's assignor with the decedent, by which the latter was alleged to have engaged a cottage and stable from the plaintiff's assignor for a period of five months, a letter written by the plaintiff's assignor to the decedent's daughter, who afterwards qualified as his executrix, stating, "As you have transacted most of the business with me, I am addressing you on the subject of my claim against your father's estate. My engagement with your family was for the season, and a long one, as you would not agree to my taking this cottage till the landlord said we might have it through October, saying the Autumn was the most pleasant time here. This long term justified me in taking such a responsibility, and now I have it on my hands," which letter was not answered, is not competent evidence in support of the plaintiff's claim. The failure to answer such letter was not an admission of the facts stated therein.

APPEAL by the defendant, Janet T. Malcolm, as executrix, etc., of James F. Malcolm, deceased, from a judgment of the Supreme

Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 28th day of April, 1902, upon the verdict of a jury, and also from an order entered in said clerk's office on the 23d day of April, 1902, denying the defendant's motion for a new trial made upon the minutes.

*Edward W. S. Johnston*, for the appellant.

*Philip M. Brett*, for the respondent.

PATTERSON, J.:

The plaintiff sued upon a contract alleged to have been made by the plaintiff's assignor with James F. Malcolm (now deceased), and pursuant to which she hired certain premises at Spring Lake, N. J., for a period of five months, from June 1 to November 1, 1900, Malcolm stipulating to pay her \$100 a week for the exclusive use and possession of the premises, which consisted of a cottage and a stable, during that period of five months. The negotiations leading to the contract were had between the plaintiff's assignor and a daughter of Mr. Malcolm. He and his family took possession of the premises. He paid at the rate of \$100 a week therefor until the 17th of July, 1900, when he died, and shortly afterward his family abandoned the premises. Mr. Malcolm left a will, which was proven, and his daughter qualified as executrix. This action was brought against her in her representative capacity. The principal defense is that the contract made between the plaintiff's assignor and Mr. Malcolm was one for board for himself and family, which terminated wholly at his death. The action has been twice tried. On the first trial the plaintiff had a verdict, but on appeal to this court the judgment entered on that verdict was reversed for an error in the admission of evidence and a new trial was ordered. On the retrial the plaintiff again recovered a verdict.

In reviewing the case on the appeal from the judgment entered upon the first trial, we were of the opinion that there was evidence to show that the arrangement made between the plaintiff's assignor and Mr. Malcolm was intended to continue until the first of November. An examination of the record on the second trial shows no substantial difference in the evidence on that subject. The plaintiff's assignor hired the premises in New Jersey upon the faith of

the understanding she had that Mr. Malcolm and his family would occupy them and pay her \$100 a week until the first of November.

But on the second trial there was again an error committed in the admission of evidence. The plaintiff was allowed to make his case upon declarations and statements of his assignor contained in a letter written by such assignor to Mr. Malcolm's daughter on July 22, 1900. That letter contains a statement of the claim of the plaintiff's assignor and was allowed in evidence, notwithstanding the fact that it was merely a voluntary and uninvited statement. It does not form part of the *res gestæ*; it was not written in answer to any communication; did not form part of any correspondence, and is merely a declaration of the plaintiff's assignor in her own favor. It contains the following statement: "As you have transacted most of the business with me, I am addressing you on the subject of my claim against your father's estate. My engagement with your family was for the season, and a long one, as you would not agree to my taking this cottage till the landlord said we might have it through October, saying the Autumn was the most pleasant time here. This long term justified me in taking such a responsibility, and now I have it on my hands."

That is substantially a condensed statement of the whole of the plaintiff's claim, and the letter was admitted as proof in the case. No answer to it was ever received. It was not competent evidence, and the failure to answer it was not an admission of the facts stated therein. (*Bank of British North America v. Delafield*, 126 N. Y. 411; *Learned v. Tillotson*, 97 id. 1; *Thomas v. Gage*, 141 id. 508.) The error in allowing this letter in evidence requires a reversal of the judgment.

The judgment and order appealed from must be reversed and a new trial ordered, with costs to appellant to abide the event.

VAN BRUNT, P. J., INGRAHAM, HATCH and LAUGHLIN, JJ., concurred.

Judgment and order reversed, new trial ordered, costs to appellant to abide event.



FRANCIS J. ROURKE, Respondent, v. THE CITY OF NEW YORK,  
Appellant.

*Services of a commissioner of deeds, employed by the city of New York, in taking affidavits of city inspectors — a waiver of the right to compensation may be established by implication.*

In an action by a clerk, employed at a fixed salary in the department of water supply in the city of New York, to recover from the city fees for services rendered by him as a commissioner of deeds, in taking the affidavits of inspectors in the employ of the department, a waiver by the plaintiff of his right to recover for such services may be established by implication resulting from the circumstances of the case, and it is not necessary for the defendant to establish an express agreement by the plaintiff not to charge for such services.

APPEAL by the defendant, The City of New York, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 19th day of May, 1902, upon the verdict of a jury, and also from an order entered in said clerk's office on the 23d day of May, 1902, denying the defendant's motion for a new trial made upon the minutes.

*Chase Mellen*, for the appellant.

*Isidore S. I. Chirurg*, for the respondent.

PATTERSON, J. :

The plaintiff, who was a clerk in the department of water supply in the city of New York, sued to recover fees as a commissioner of deeds for services rendered in taking affidavits of inspectors in the bureau of water supply in the borough of Brooklyn. The defendant set up the affirmative defenses of waiver of the right to compensation, and that the plaintiff took the affidavits as part of his regular clerical duties. The plaintiff took the affidavits for some years prior to January, 1898, but makes no claim except for compensation for those taken between January, 1898, and October, 1901. On the trial the plaintiff had a verdict and from the judgment entered thereon and from an order denying a motion for a new trial the defendant appeals. The plaintiff says that some time in April, 1898, he had a conversation with Mr. Frost, who was the water registrar, and was told to go ahead and take affidavits and that Mr.

Frost would see that his fees as commissioner were paid — that is, that the city would pay them. Without considering the question of the authority of the water registrar to enter into a contract of this character for the city, we think the judgment the plaintiff has recovered should be reversed for the failure of the court to instruct the jury, upon the request of the defendant, that they were to determine, as matter of fact, whether or not the plaintiff had waived his right to compensation. There was evidence which would have authorized the jury to find that such compensation was waived. The learned judge charged the jury that the question of waiver was in the case. He said "the plaintiff, as a clerk in the employ of the city under a fixed salary, had a right to waive compensation for taking the affidavits in question, and the question to be determined by you is whether, in point of fact, he did waive his right in that respect, or in other words, whether, as between him and the city, there was an agreement that he was not to be paid for taking the affidavits." The court further instructed the jury that the question to be determined was not whether the plaintiff made an agreement that he should be paid, but that it was whether the defendant had proven an agreement that he *was not* to be paid; whereupon the counsel for the defendant asked the court to charge that it is for the jury to determine, as matter of fact, whether or not the plaintiff waived his right to compensation.

The effect of the charge of the learned judge was that there could be no waiver except by an agreement on the part of the plaintiff not to charge the city for his services as commissioner of deeds. The court also charged that the burden of proof was upon the defendant to establish that an agreement existed that the plaintiff *was not to be paid* by the city. We do not understand the decision in *Merzbach v. Mayor* (163 N. Y. 16) to go to that extent. It is there remarked that the jury should have been instructed *under the particular facts* of that case that the burden was upon the defendant to establish such an agreement, and that remark was made because of the condition of the pleadings and the undisputed facts appearing in the record, but it was also remarked that the plaintiff there "was entitled to the fees (as notary public) unless he waived his right thereto, either expressly \* \* \* or *impliedly*."

Under the ruling of the court that the question of waiver was an

issue in the present case, it was competent for the defendant to contend before the jury that the plaintiff had waived his right to the fees otherwise than by an express agreement not to charge them, and that, therefore, the question was a general one on the whole evidence for their determination. Waiver could be established by implication resulting from the circumstances proven and the conduct of the plaintiff, and was not solely dependent upon the defendant showing that the plaintiff expressly agreed not to charge fees as a commissioner of deeds.

The judgment and order should be reversed and a new trial ordered, with costs to appellant to abide the event.

O'BRIEN, McLAUGHLIN and LAUGHLIN, JJ., concurred.

VAN BRUNT, P. J. (concurring) :

I concur in the result. I am of the opinion that the plaintiff being an employee of the city could make no charge for work done even for the city in office hours.

I think that another reason why there can be no recovery in this case is, that there is no evidence whatever that any person in the department of water supply could incur any such obligation on the part of the city.

Judgment and order reversed, new trial ordered, costs to appellant to abide event.

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CATHARINE SCHILLING, Respondent, v. UNION RAILWAY COMPANY  
OF NEW YORK CITY, Appellant.

*Proof of statements made in the presence of a party seriously injured — the injured party must be shown to have been cognizant of what was said.*

In an action to recover damages for personal injuries, a hospital surgeon, who went to the plaintiff's house with an ambulance to take her to the hospital and found her lying upon a couch seriously injured and suffering from shock, but not unconscious, should not be allowed to testify to statements made in the plaintiff's presence concerning the manner in which the accident happened and to which the plaintiff made no reply, unless it appears that at the time such statement was made the plaintiff was cognizant of what was said and was in a condition to understand and appreciate it.

VAN BRUNT, P. J., dissented.

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APPEAL by the defendant, the Union Railway Company of New York City, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 14th day of May, 1902, upon the verdict of a jury for \$5,000, and also from an order entered in said clerk's office on the 28th day of May, 1902, denying the defendant's motion for a new trial made upon the minutes.

*Addison C. Ormsbee*, for the appellant.

*William Victor Goldberg*, for the respondent.

PATTERSON, J. :

This was an action to recover damages for personal injuries sustained by the plaintiff through the alleged negligence of the defendant's servants in prematurely starting a car upon which she was a passenger. The plaintiff had a verdict.

The car was proceeding up the Boston road and when it was between One Hundred and Sixty-sixth and One Hundred and Sixty-seventh streets she gave a signal to stop. She testified that the car did stop and she attempted to alight. It was an open car. She and two other witnesses testified that the car came to a full stop and as she attempted to alight it suddenly started again with a jerk and she was thrown to the ground and seriously injured. There was testimony of witnesses for the defendant that the car did not stop at all and that the plaintiff undertook to descend while it was still in motion. One of the grounds urged by the defendant for a reversal of this judgment is that the verdict was against the weight of evidence, but the cause was plainly one for the jury, both on the subject of the negligence of the defendant and the contributory negligence of the plaintiff.

It is further urged by the defendant that the judgment should be reversed for an error in the rejection of evidence. At the time this accident happened, Dr. Bolt was ambulance surgeon at the Fordham Hospital. He went to the house of the plaintiff with an ambulance to take her to the hospital. She was lying on a couch. He testifies that when he went to the house and took the plaintiff in the ambulance she was conscious and gave a history of the case and that she was not unconscious that night; that he examined her

before she was put in the ambulance and after. He was then asked the question: "Q. Did she say anything to you that you recall as to how the accident had happened, or did you ask? A. I asked that. I don't know whether she did it or some person, because I was told that she fell — Q. Never mind what you were told; don't say that. Did any one in her presence say anything as to how the accident happened? A. Oh, yes. Q. She being how near? A. Well, possibly a couple of feet. That was the occasion when I asked how it had happened. Q. Now, what was said — don't answer until Mr. Goldberg has an opportunity to make his objection — now, what was said by yourself, personally, in her hearing, as to how the accident happened? Mr. Goldberg: I object on the ground that it does not appear that the plaintiff heard or understood what was said. The doctor has testified that she was suffering from severe shock. The Court: I would first like to have the doctor indicate whether she gave any perceptible indication as to whether she heard what was said about the way the accident happened. Go back into your memory and see if you can find any indication whatever that she heard by any response on her part or physical action. The witness: I could not recall that, Judge, because — The Court: Very well. [Objection sustained.]" Thereupon an exception was taken by the defendant's counsel. The court then said: "The stenographer will note that the ruling is made because, until it appears by inference that the remark was understood by the patient, there was no call upon her to assent or dissent, and, therefore, she is not responsible for what someone else said."

We think this ruling was right. One of two things was sought to be established by the rejected testimony; either an actual admission by the respondent of the statement of how the accident happened, or an acquiescence by silence. As the witness stated that he could not recall that the plaintiff made any response, the testimony, if admissible at all, could only relate to acquiescence by silence. That statements of the plaintiff actually made to this physician would be admissible in evidence, they not being privileged, results from what was held in *Griffiths v. Met. St. Ry. Co.* (171 N. Y. 109), and *Green v. Met. St. Ry. Co.* (Id. 201). But those cases are not in point upon the subject of acquiescence by silence. There is a general rule that where, in the presence and hearing of a party to an

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action, something pertinent to the matters involved in that action is stated, and which it is for his interest to controvert, and he remains silent, that is some evidence which may go to a jury. But the rule on that subject is stated in Greenleaf on Evidence (Vol. 1 [15th ed.], § 197) as follows: " But acquiescence, to have the effect of an admission, must exhibit some act of the mind and amount to voluntary demeanor or conduct of the party. And whether it is acquiescence in the conduct or in the language of others, it must plainly appear that such conduct was fully known, or the language fully understood by the party, before any inference can be drawn from his passiveness or silence. The circumstances, too, must be not only such as afforded him an opportunity to act or to speak, but such also as would properly and naturally call for some action or reply from men similarly situated."

Passing the point as to whether the plaintiff was called upon at all to respond, the trial judge was right in requiring that it should be made to appear that the plaintiff was cognizant of what was said by this witness and was in a condition to understand and appreciate it. His testimony would indicate that he made his statement of the cause of the accident when he visited the plaintiff at her house, where she was suffering from the shock and from the pain caused by her injuries. The witness said the plaintiff was conscious, but he declares that she was suffering from shock.

We know of no case, and can find none, which holds that, under such circumstances, a party seriously injured and suffering from shock is bound at his peril to give heed to every remark that is made by a person in his presence relating to the occurrence which produced those conditions.

The judgment and order must be affirmed, with costs.

INGRAHAM, HATCH and LAUGHLIN, JJ., concurred ; VAN BRUNT, P. J., dissented.

Judgment and order affirmed, with costs.

OTTO H. DROEGE, as Receiver of the Property of ISIDOR HENRY, Plaintiff, v. EDWIN W. BAXTER and ALBERT F. SCHENKELBERGER, Respondents.

ALBERT REITMAN, a Judgment Creditor, Appellant.

*Costs—liability therefor, of a judgment creditor who secures the appointment of a receiver of his debtor's property and requests the receiver to bring an action to recover it, in which a judgment for costs is recovered against him.*

A judgment creditor, at whose instance a receiver of the property of the judgment debtor had been appointed in proceedings supplementary to execution, requested the receiver to commence an action to recover property alleged to belong to the judgment debtor. The receiver brought the action in the Supreme Court and recovered judgment at the trial. The defendants took an appeal to the Appellate Division, which resulted in the reversal of the judgment. The receiver then, in good faith, took an appeal to the Court of Appeals where the judgment of the Appellate Division was affirmed.

Upon a motion by the defendants in the action, under section 8247 of the Code of Civil Procedure, to compel the judgment creditor to pay the costs of the action, it was

*Held*, that as it appeared that the judgment creditor knew of the pendency of the action and took no steps to discontinue it, it could not be said that the receiver's action in defending the appeal to the Appellate Division and in taking the appeal to the Court of Appeals was unwarranted and that the judgment creditor was thereby relieved from liability for the costs of the appeals.

APPEAL by Albert Reitman, a judgment creditor of Isidor Henry, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 6th day of September, 1902, directing said judgment creditor to pay the costs of the action to the defendants' attorney.

The appellant, Albert Reitman, was directed by the order appealed from to pay costs in an action brought by Otto H. Droege, as receiver, in his behalf as a creditor of Isidor Henry against the defendants. Reitman was a judgment creditor of Henry and instituted supplementary proceedings after return of execution unsatisfied, and, believing that Henry had certain property interests which could be reached, he asked for the appointment of the plaintiff, Otto Droege, as receiver. He gave to the receiver a written request to bring an action against the defendants to recover property or its

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value belonging to Isidor Henry levied upon by them and subsequently sold and purchased by them. Thereupon, the receiver presented his petition and the written request and obtained an order allowing him to commence such an action "in any of the courts of record of this State," and which provided that in view of the written request filed with the petition, the receiver be relieved from giving any bond as security for costs. In the action thus begun the receiver was at first successful, but an appeal was taken to the Appellate Division and then to the Court of Appeals, and it resulted in a judgment in favor of the defendants, and they then moved to compel the judgment creditor Reitman to pay the costs of such action, which was denied. Thereafter, on new affidavits, the present motion was made and granted; and from the order entered requiring Reitman to pay the costs he appeals.

He avers in his affidavits that, although he gave the written request to the receiver to bring the suit, he told him to bring it in the Municipal Court so as to reduce costs, if any, against him, and that the receiver refused to do so, asserting that he would not in any event be liable for costs, and that it was the duty of the receiver to bring the action where he chose. Further, Reitman avers that he did not consent nor did he know of the appeals taken by the defendants to the Appellate Division and by the receiver to the Court of Appeals, for which costs are included in the sum charged against him. Reitman's attorney also avers that he told the receiver not to bring the action in the Supreme Court. The receiver avers that after the action was commenced the attorney for Reitman asked if it was not better to discontinue it and bring suit in the Municipal Court, but that nothing was said as to reducing costs but merely as to facilitating the trial, and that neither Reitman nor his attorney directed him not to bring the action in the Supreme Court. He explains that he came into the present motion, having seen in the *Law Journal* a statement criticising him as receiver and denying motion for costs as against Reitman.

The court granted the motion charging costs, and from the order so entered Reitman appeals.

*Henry L. Franklin*, for the appellant.

*William J. Barr*, for the respondents.



O'BRIEN, J. :

The appellant's first point is that the order appealed from is not authorized by section 3247 of the Code of Civil Procedure, which provides that "where an action is brought in the name of another by a \* \* \* person who is beneficially interested therein \* \* \* the \* \* \* person so interested is liable for costs, \* \* \* and \* \* \* the court may by order direct the person so liable to pay them." The appellant argues that in such a case the action must be begun and conducted under the direction of such person, and that here the action was conducted and brought by the receiver in the Supreme Court contrary to instructions. The answer to this is, that the written request authorized the bringing of the action, and the order stated "in any of the courts of record," and the receiver averred that no objection was made till after the action was begun, and further, that the receiver was not directed to discontinue such action. These contentions the court resolved in favor of the receiver.

The second point is that the statements of Reitman's attorney to the receiver cannot be used against Reitman. This is answered by the fact appearing that such attorney was brought in and presented affidavits in favor of Reitman in opposition to the motion, and it was, therefore, proper that the receiver should be allowed to deny such statements. Furthermore, the facts are not changed if all the statements of the attorney be disregarded, for the receiver denies that Reitman directed him not to bring the action in the Supreme Court.

The third and more serious point of the appellant is, that the request to sue did not cover the right to appeal, and that as costs of appeal were included the order must be reversed *in toto*. It was not the receiver, however, but the defendants who first appealed and the receiver was surely justified in defending on appeal a judgment in his favor. Though beaten on appeal it cannot be said that the receiver did an improper or unwarranted act in appealing to the Court of Appeals unless it has been shown that the creditor had disapproved such act. Although the creditor knew that the action was going on in the Supreme Court he took no steps to discontinue it, and by his thus leaving the matter with the receiver it seems but just that the appeal, conducted in good faith by the receiver, should

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be approved. In *Ward v. Roy* (69 N. Y. 96) it was held that "if a creditor at whose instance a receiver has been appointed, and especially if he is solely interested, instigates and conducts a prosecution for his own benefit through the receiver, the obligation to pay costs created by the statute is equitably as binding on him as if the legal machinery was not employed." The appellant insists that he did not conduct the case and did not direct the appeal, but this is a begging of the question, it appearing that he had the receiver appointed for the very purpose of pursuing and securing, if possible, the property for his sole benefit.

The order, therefore, should be affirmed, with ten dollars costs and disbursements.

VAN BRUNT, P. J., INGRAHAM, McLAUGHLIN and HATCH, JJ., concurred.

Order affirmed, with ten dollars costs and disbursements.

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BRIDGET M. KELLY, Appellant, v. ALICE M. THEISS and KATIE THEISS, Respondents.

*Appeal — it lies from the judgment, not from the order, dismissing a complaint — oral notice of dishonor of a note — an allegation that it "was sent" is not inconsistent with oral notice.*

An appeal will not lie from an order dismissing a complaint. The proper practice is to appeal from the judgment entered upon such order.

An oral notice of the dishonor of a promissory note, given personally or through an agent, is sufficient to charge the indorsers thereof.

A complaint in an action brought to charge such indorsers, which alleges that "said note was duly protested and due notice of said demand and non-payment was sent to the defendants above named, and that the cost of said protest was \$1.25," is sufficient to authorize the admission of proof of an oral notice of dishonor.

APPEAL by the plaintiff, Bridget M. Kelly, from a judgment of the Supreme Court bearing date the 24th day of March, 1902, and entered in the office of the clerk of the county of New York, upon an order of the Supreme Court made at the New York Trial Term,

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which order was entered in said clerk's office on the 24th day of March, 1902, dismissing the complaint, and also from the order upon which the said judgment was entered.

*Charles W. McCandless*, for the appellant.

*James A. Douglas*, for the respondents.

O'BRIEN, J. :

There is no practice which sanctions an appeal from the order and it may, therefore, be dismissed — the questions to be considered arising upon the appeal from the judgment.

In this action it was sought to charge the defendants as indorsers of a promissory note ; and the facts connected with the making and delivery thereof having been stated upon the former appeal (*Kelly v. Theiss*, 65 App. Div. 146) need not be here repeated. The sole question presented is whether or not under the complaint the plaintiff may prove the giving of oral notice of dishonor to defendants personally or through an agent. We do not understand that it is seriously contended that an oral notice would be insufficient whether given personally or through an agent ; but if authority is needed for such a proposition, it can be found in abundance in text books, cases and the Negotiable Instruments Law itself. (4 Am. & Eng. Ency. of Law [2d ed.], 414 ; *Cuyler v. Stevens*, 4 Wend. 566 ; *Woodin v. Foster*, 16 Barb. 146 ; 2 Danl. Neg. Inst. [4th ed.] § 972 ; Neg. Inst. Law [Laws of 1897, chap. 612], §§ 162, 167.)

Our inquiry is thus narrowed down to the question whether or not the learned trial judge was right in his ruling excluding such evidence upon the ground that plaintiff had pleaded a written notice. The complaint alleged that "said note was duly protested and due notice of said demand and non-payment was sent to the defendants above named and that the cost of said protest was \$1.25."

The construction given to the language was that it imported that a written notice was sent. We think that this is giving too narrow and too restricted a meaning to the word "sent," it being evident that one can send a notice either verbally or in writing. Stress, however, is placed upon the fact that after the statement that notice was sent appears the language about the cost of protest. Here again, we think undue weight is given to the words referring to the cost of protest, after the statement of the sending of notice.

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The first thing in the order of time would be to have the note protested which would result in the cost alleged of one dollar and twenty-five cents. After such protest, the form of the notice, whether verbal or written, was at the option of the holder of the note.

We think, therefore, that, under the allegations, it was entirely competent for the plaintiff to prove either written or oral notice and that the court was in error in excluding proof of the latter upon the ground that a written notice was alleged.

It follows, accordingly, that the judgment must be reversed and a new trial ordered, with costs to the appellant to abide the event.

VAN BRUNT, P. J., INGRAHAM, McLAUGHLIN and HATCH, JJ., concurred.

Judgment reversed, new trial ordered, costs to appellant to abide event; appeal from order dismissed.

ALMIRA G. FISK and HENRY B. KINGHORN, as Administrators, etc.,  
of HENRY G. FISK, Deceased, Appellants, v. FISK, CLARK &  
FLAGG and Others, Respondents.

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*Firm name—right of an assignee acquiring the good will from the legal representatives of the last surviving partner—action to restrain a corporation from adopting such firm name in its corporate title.*

Although the personal representatives of the last survivor of a firm cannot assign the firm name, as such, the good will of the firm, which is assignable by them, includes the right of the purchaser to advertise and hold himself out to the public thereafter as the successor to the property and business of the extinct firm, and where a projected sale of such good will has not been consummated because a corporation has appropriated the firm name for its corporate title, a court of equity will intervene to restrain the corporation from making further use of the firm name.

VAN BRUNT, P. J., and McLAUGHLIN, J., dissented.

APPEAL by the plaintiffs, Almira G. Fisk and another, as administrators, etc., of Henry G. Fisk, deceased, from a judgment of the Supreme Court in favor of the defendants, entered in the office of the clerk of the county of New York on the 7th day of July, 1902, upon the decision of the court rendered after a trial at the New York Special Term dismissing the complaint.

*Henry B. Kinghorn*, for the appellants.

*Frank J. Dupignac*, for the respondents.

O'BRIEN, J. :

The principal contention before us was presented to this court on the former appeal from the order denying the plaintiffs' motion for a preliminary injunction, which order was affirmed in June, 1902, without opinion. Our view then was that the court at Special Term upon the motion for the injunction had correctly held that "where all the partners entitled to use the firm name, die or retire and none of them has made any assignment or appointment of it, the right to such use dies with the last survivor and does not pass to his personal representatives." (*Fisk v. Fisk, Clark & Flagg*, 37 Misc. Rep. 737.) Therein the facts and a discussion upon the law, particularly as to the construction of the statute (Partnership Law [Laws of 1897, chap. 420; Gen. Laws, chap. 51], § 20), are fully given and need not be repeated. We did not, however, adopt the opinion in full, because, while there was sufficient to justify the denial of the motion for an injunction until such time as the case could be tried, there was a question involved which was not then discussed, nor does it appear to have been considered upon the trial and which we think entitled the plaintiff to some relief.

Upon such trial it was made clearly to appear that the defendants appropriated and intended to use as their corporate title the old firm name, and advertised in effect that they were to replace the old partnership of Fisk, Clark & Flagg. While the right to use the old firm name did not descend to and become a part of the estate of the last surviving partner, it will not be disputed that the property and good will of the business as well did so descend, and we think that any contemplated action of the defendants which tended illegally to injure the value of such good will should be enjoined because an injury to a property right.

The good will of a partnership includes, among other things, the trade name, to the extent that the purchaser may stand as the successor of the former firm. As said in the American and English Encyclopædia of Law (Vol. 14 [2d ed.], p. 1085): "The good will of a trade or business may be defined as the advantage or benefit which is acquired by an establishment beyond the mere value of

the capital, stock, funds or property employed therein in consequence of the general public patronage and encouragement which it receives from constant or habitual customers on account of its local position or common *celebrity* or *reputation* for skill or affluence or punctuality, or from other accidental circumstances or necessities, or even from ancient partialities or prejudices." Upon the death of the last survivor of the firm, therefore, although the statute makes no provision for the sale of the name as such by his administrators, and although that name in itself is not assignable by them, still the administrators may sell, in addition to the property and trade marks, the good will of the firm, which includes the right of the purchaser to advertise and hold himself out to the public thereafter as being the successors to the property and business of the firm which has become extinct. As said in *People v. Tioga Com. Pleas* (19 Wend. 75), "executors at law take everything belonging to their testator which can be considered as property or form the subject of dealing in any way." And so as to administrators, the policy of the law is that they should take everything as far as possible wearing the semblance of property of the intestate as part of the assets to pay debts.

If the right to state that one has succeeded to the property and business of the firm has been rendered valuable, then it is as much a property right to be sold by the administrators as the goods which a merchant has in his store when he dies. And strangers who endeavor to illegally appropriate such a valuable right should be prevented from so doing by a court of equity. Nor does it make any difference whether the stealth of such a property right is done under the guise of a partnership or through a corporation. Neither should be allowed, without compensating the representatives of the deceased partner, to appropriate a valuable part of the good will.

We have no wish to be understood as including in the good will the right to use the firm name in any other way than as an adjunct or addition to the purchaser's own firm name or title. What a purchaser of the good will acquires is the right to advertise or issue a statement showing that he has succeeded to the business of the firm which, by the death of the last survivor, has become extinct. That this right is valuable and that it can in the present instance be sold with the other property of the firm appears; and the evidence

equally establishes that its value will be impaired, if not destroyed, by the defendants' appropriation of the old firm name as their corporate title and advertising themselves to the public as the successors of the old firm. That many of the former customers would thus be induced to deal with the new corporation and that confusion in the public mind would result as to who had succeeded to the property and business of the old firm is certain from the evidence, which shows that letters intended for such successors were sent, owing to the name assumed by the defendants and their advertisements and circulars, to the corporation which they had created. The advantage which would accrue to any one buying the assets of the partnership from being able to truthfully represent that he had succeeded to the business of the old firm is thus made apparent, and this would be impaired if not destroyed should the defendants be permitted to appropriate the old firm name. The effect of permitting them to use such name will be to diminish the value of this right or privilege which, in connection with the other property of the business, could be sold; and we think that it is competent for a court of equity to prevent such injury and wrong.

This wrong or injury is quite separate and apart from that which would be inflicted upon the public who would naturally be deceived and misled into believing that they were dealing with persons connected in some legal way with the old firm. It may be that plaintiffs have no standing to prevent such a wrong except in connection with some relief to which they are directly entitled. The injury complained of in this action is that of taking away wrongfully and without compensation to the estate the value of the good will of the business by interfering with the use of the old trade name by the purchaser as successor to the old firm. It appears from the evidence that the scheme of the defendants has so far been successful, and that negotiations for the sale of the good will of the firm have come to an end. We think applicable what was said in *Peck Brothers & Company v. Peck Bros. Co.* (113 Fed. Rep. 291) where a new corporation attempted to use the name of one which had become embarrassed and was in the hands of a receiver, that "the name assumed was voluntarily selected, and as we must believe, for the purpose of appropriating the good will and trade name of another. If not originally so designed, it is clear that upon failure to procure

the right by purchase, the name was afterwards used for the purpose of misleading the public and appropriating to itself without right, the valuable trade name of another. That wrong has been effected. Further wrong should be prevented. The remedy, if the defendants be honest, is simple. They have but under the law to change the name which they selected and which has wrought the injury. In any event they should be enjoined from further perpetration of the wrong."

We think, therefore, that the plaintiff in this case is entitled to relief directing that the defendants be restrained from making further use of the name of the old firm as part of their corporate title, thus giving to the administrators the benefit and value that will accrue from their ability to confer on the purchaser of the good will the right to use the name in conjunction with the statement that such purchaser is the successor to the business of the old firm. The judgment accordingly should be reversed and a new trial ordered, with costs to the appellant to abide the event.

PATTERSON and LAUGHLIN, JJ., concurred; VAN BRUNT, P. J., and McLAUGHLIN, J., dissented.

Judgment reversed, new trial ordered, costs to appellant to abide event.

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THE BLUMENBERG PRESS, Appellant and Respondent, v. THE  
MUTUAL MERCANTILE AGENCY, Respondent and Appellant.

*Lien of a manufacturer who is not required to make delivery before payment — when, although the contract is entire, the lien does not cover the product manufactured before default — the giving of credit operates as a waiver of the lien.*

A mercantile agency, which desired to publish a reference book, entered into a contract with a printing house, by which the latter agreed to set the type for the book, print it and make it ready for binding. The contract fixed the price to be paid for the different branches of the work, and stipulated that the price for composition should include ownership of the linotype slugs, composing the pages and electrotype plates of such pages, and also that "payments will be made weekly covering the amount of work performed."

*Held*, that the contract was an entire one, and that, as it did not require the printing house to make deliveries thereunder prior to receiving payment, the



printing house had an artisan's lien upon all work done and not paid for or delivered;

That, in the event of the mercantile agency's making default in the payment of the weekly installments, the printing house could not claim a lien upon linotype slugs manufactured and paid for prior to the default which the mercantile agency had allowed to remain in the possession of the printing house to facilitate the making of corrections in such slugs, especially when the printing house made a charge for the storage of such slugs, thus showing that its possession thereof was for the benefit of the mercantile agency and not under a claim of lien;

That the acceptance by the printing house of notes, in payment of the weekly installments due under the contract, operated (in view of the charge for storage of the linotype slugs) as a waiver of its right to assert a lien upon the slugs manufactured during the period covered by the extension of credit created by the notes, although the notes were not paid.

CROSS-APPEALS by the plaintiff, The Blumenberg Press, and by the defendant, The Mutual Mercantile Agency, from a judgment of the Supreme Court, entered in the office of the clerk of the county of New York on the 30th day of April, 1902, upon the decision of the court, rendered after a trial at the New York Special Term, in an action to foreclose an artisan's lien.

The action is brought under section 1737 of the Code of Civil Procedure, to enforce a lien of \$9,738.35 on linotype slugs, paper, etc., made by plaintiff for the defendant under a contract dated November 3, 1899, the defendant having defaulted in payments for the work performed.

The contract is embodied in a letter sent by the plaintiff to defendant on November 3, 1899, wherein it was said :

"For the sum of twenty-three thousand eight hundred dollars (\$23,800) we will agree to set up in agate linotype slugs one thousand pages of the first edition of your reference book, \* \* \* said amount to include ownership by you of all material in said pages; also include electrotype plates of all said pages, it being understood, however, that alterations from original copy shall be charged for at the rate of one dollar (\$1.00) per hour for all work done on machine, and for alterations requiring hand work only, a charge of sixty (60) cents per hour shall be made.

"For each additional page over and above one thousand pages, the rate shall be twenty-two dollars (\$22.00) per page, to include ownership by you of material in said page and electrotype plate of same.

"For the further sum of one thousand two hundred and eighteen dollars and seventy-five cents (\$1,218.75), we will agree to print on paper to be supplied by you, five thousand (5,000) copies of each of one thousand pages, eight pages to a form, and for each additional eight pages over and above one thousand pages, the rate shall be nine dollars and seventy-five cents (\$9.75) for five thousand (5,000) impressions.

"For the further sum of three hundred and twelve dollars and fifty cents (\$312.50), we will agree to fold in 16 page signatures and press ready for bindery, five thousand copies of each book of one thousand pages, and for each additional number of printed sheets at the rate of one dollar (\$1.00) per thousand signatures of 16 pages.

"The foregoing rates apply to first edition of your book. \* \* \* If we receive the first installment of copy on November 15th, and daily supplies of not less than 15 pages thereafter, we will agree to have ready for the binder on February 20th, 1900, complete copies of one thousand pages or over.

"It is understood that upon submission of proper vouchers, payments will be made weekly covering the amount of work performed."

These conditions were accepted in a letter written by defendant the same day. Thereafter plaintiff began the work, purchasing material, preparing type in slugs or forms representing pages of the reference book, and printing the parts of the book which were to be issued for each State in the Union, and issued weekly statements of the work performed which the defendant paid, receiving from time to time the sheets printed. The slugs from which the pages were printed and which, under the contract, belonged to the defendant when paid for, were not removed from the plaintiff's possession when the weekly bills were met as were the printed sheets, as it was desired that they should be on hand in case any revision was required of the plaintiff, in accordance with the agreement; and plaintiff, therefore, purchased and erected cabinets, arranged so that any particular page could readily be obtained. In the course of the work many changes and corrections were thus made in the slugs, for which charges were stated in the weekly bills and paid by the defendant. The total amount of work performed and materials furnished amounted to \$60,476.60, and to this the plaintiff added

\$900 for storage of the slugs in its cabinets during the period. The total payments made by the defendant prior to the bringing of the action for payments not made was \$51,874.48, and the balance due plaintiff, as conceded upon the trial — the sole question being as to whether or not a lien attached — was \$9,638.35, amounting, with interest, to \$9,879.62.

It further appeared upon the trial that the vouchers for weekly bills up to and including February 8, 1901, aggregated \$51,874.48, which is less than the total payments made down to June, 1901. And it was shown that the plaintiff delivered to the defendant property worth about \$58,000 during the period, and retained in its possession all the slugs which it had made for defendant, and placed in its cabinets, and a small quantity of paper and printed sheets. It is upon these slugs and papers remaining, and worth about \$4,000 as second-hand material, that the plaintiff seeks to enforce his lien for the balance due from the defendant.

The defendant had difficulty in meeting the weekly payments, and the plaintiff, therefore, shortly after the work was begun, agreed not to press the indebtedness of \$5,000 until all the States were in; "until December, 1900;" and a number of the weekly statements provided for the payment of sums "in excess of \$5,000" outstanding. Thereafter, three notes were given by defendant to plaintiff, one dated May 21, 1901, for \$666.67; another, May 21, 1901, for \$666.66, and the other July 5, 1901, for \$1,010, not as part of the \$5,000, but to pay the balances remaining. These notes were not paid, and were tendered to the defendant at the trial.

The Special Term held that the plaintiff had a lien for the unpaid amount which it could enforce against such slugs only as were made subsequent to February 8, 1901, and upon such paper sheets as were in its possession. From the judgment so entered the plaintiff appeals, on the ground that it has a lien on all the slugs, and the defendant appeals on the ground that plaintiff has no lien whatever.

*Joseph N. Goldbacher*, for the plaintiff.

*Henry Schoenherr*, for the defendant.

O'BRIEN, J. :

The contract was one and not several for the printing of the first edition of defendant's reference book. It shows upon its face that

the intention of the parties was that the plaintiff should do all the work required in the way of making the type, printing and correcting proof ; in fine, everything necessary up to the binding and publication of the book. Although the contract provided for weekly payments for work performed, this did not effect a change, as there was but one contract for the entire work. That being so, a lien for the total amount due attached to the goods manufactured by the plaintiff and not delivered to the defendant, and the plaintiff waived its lien only on such of the goods as were delivered to the defendant. (*Wiles Laundering Co. v. Hahlo*, 105 N. Y. 234.) In the case cited, suit was brought to enforce a lien on goods of the defendant laundered by the plaintiff under a contract which provided that payments should be made on the first of each month for goods laundered and returned during the preceding month. It was held therein that no lien attached either for the balance due the plaintiff or for the work done on the goods in its possession, for the reason that a particular time of payment was fixed by the contract, which was subsequent to the time when the owner was entitled to a return of the property. It was stated in the opinion, however, that where work is done under a single contract which does not specify that payments are to be made after delivery of the goods, a lien attaches to all the property undelivered, "and if part of it is voluntarily returned without payment for the work, the only consequence is that the person doing the work has abandoned a part of his security for the total amount due him and retained his lien therefor only upon the property which remains in his possession." In the case at bar the contract did not require that deliveries should be made to the defendant prior to payments for the work performed. The plaintiff had a lien, therefore, for sums due on all the goods produced and not delivered to the defendant.

We are thus brought to the question as to what goods were undelivered after they were produced under the contract. *First*, we have the goods manufactured up to February 8, 1901. It is conceded that payments made on account were sufficient to pay for what was produced up to that date, including not only the printed sheets, but also the slugs. The sheets were all delivered and the defendant obtained the actual possession of them, and no question of lien arises as to them. With regard to the slugs, the contract

provided that when manufactured and paid for, ownership therein passed to the defendant, and there was nothing in the contract to prevent the defendant from taking them into its actual possession, also, save that the plaintiff under the contract was entitled to use them for the purpose of making any needed corrections or revisions. It was to facilitate this purpose that the defendant permitted the slugs to remain with the plaintiff. Were the slugs retained by the plaintiff, however, as property on which a lien might attach as property undelivered to the defendant, or were they kept for the defendant as its property? The answer to this question is to be found in the manner which the parties themselves construed the contract and treated the property. Possession was retained by the plaintiff, but it made a charge of \$900 for storage which was assented to by the defendant. This charge for storage excludes the idea that plaintiff retained possession under a claim for lien because where property is retained for a lien no storage can be charged. It was held in *Somes v. Brit. Emp. Shipping Co.* (8 H. L. Cas. 338), that no authority can be found for the proposition that one holding property for the purpose of enforcing a lien can hold the proprietor for the expense of keeping it, and the rule works both ways. These slugs, therefore, were the property of the defendant and legally stand in the same position as the sheets delivered by the plaintiff prior to February 8, 1901, and no lien attaches thereon. We thus agree with the learned judge at Special Term in the statement that "these goods were fully paid for and were left in plaintiff's possession for a particular purpose wholly inconsistent with the claim of a lien, and under such circumstances no lien will attach. (19 Am. & Eng. Ency. [2d ed.] 12.)"

We are, then, to determine whether a lien attaches, as found by the Special Term, to the slugs produced by the defendant subsequent to February 8, 1901, for which it is conceded payment has not been made. Up to this point we have discussed the questions presented as if the contract originally made between the parties was being carried out in its entirety. As a matter of fact, however, the evidence shows that there was a material deviation from the terms of that contract upon the subject of payments. It provided that the payments should be weekly for the work performed. The defendant, however, soon fell behind and the plaintiff agreed not

to insist upon payment for the time being nor until a date named when certain work was performed. The claim thus deferred was for \$5,000 for work produced, and the weekly statements show that payments were made only in excess of such \$5,000 due. Credit was further extended by the plaintiff accepting three notes for the balance due over the \$5,000. It is true that these notes were never paid and were tendered to the defendant on the trial, but they were accepted in payment and such acceptance was a waiver of the lien. An extension of credit waives a lien. (19 Am. & Eng. Ency. of Law [2d ed.], 28.)

We have not overlooked the cases in which it has been held that mere acceptance of notes where they are not paid and where possession of the property has in the meantime been retained, does not constitute a waiver, it being competent to return the notes. In the application of such rule, however, the character of the possession must be considered, and where, as here, the possession which the plaintiff had was for the defendant, as shown by the fact that a charge for storage was made, the legal result upon the question of waiver is the same as though there was an actual delivery of the property and acceptance of notes in payment therefor.

With respect to the slugs, therefore, it thus appears that the plaintiff has lost its lien by accepting payment or extending credit or transferring ownership and charging storage, either and all of which would constitute a waiver of any lien which plaintiff might otherwise have had. And what has been said about slugs applies equally to the paper and other property which it holds.

That part of the judgment, therefore, appealed from by the plaintiff, which holds that the plaintiff is not entitled to a lien upon the entire property, should be affirmed; and as to the defendant's appeal, the judgment should be reversed and a new trial ordered, with costs to the defendant to abide the event.

VAN BRUNT, P. J., INGRAHAM, McLAUGHLIN and HATCH, JJ., concurred.

Judgment so far as appealed from by plaintiff affirmed; and on defendant's appeal, judgment reversed, new trial ordered, with costs to defendant to abide event.

FRANCES J. STORMS and ALFRED STORMS, Respondents, v. THE  
MANHATTAN RAILWAY COMPANY and THE NEW YORK ELEVATED  
RAILROAD COMPANY, Appellants.

*Lease — right of a lessee to recover damages occasioned by an elevated railroad constructed with the assent of the lessor — effect of the lessee holding under a renewal provided for in the original lease — form of conveyance of easements to which the elevated railroad company is entitled on paying the damages — violation of a covenant against an assignment of a lease — effect of a consent to one assignment.*

May 1, 1872, the city of New York demised certain premises to Francis J. Leggett for a period of twenty-one years by a lease containing a covenant for a renewal upon terms to be agreed upon by the parties or determined by appraisers or by an umpire. In 1875 the city of New York consented to the construction and operation of an elevated railroad in front of the property. The construction of the road was commenced in 1878 and it was put in operation in 1879. Upon the expiration of the lease, which, by mesne assignments, had passed to Frances Storms, who also owned a building erected upon the demised premises, a renewal lease for twenty-one years was executed to her.

In an action subsequently brought by Frances Storms and Alfred Storms, who, by assignment from Frances Storms, had acquired an interest in the lease, against the elevated railroad company, to recover damages for the impairment of the easements appurtenant to the leasehold property, it was

*Held*, in view of the plaintiffs' ownership of the building erected upon the demised premises and of the covenant of renewal contained in the lease, that such renewal lease did not involve the creation of a new tenancy, but only the continuance of the existing tenancy and that, consequently, the fact that such renewal was executed after the city had consented to the construction and operation of the railroad and such operation had actually begun, did not deprive the plaintiffs of the right to maintain the action;

That it could not be successfully urged that the plaintiffs had suffered no damage from the operation of the road since the renewal of the lease, upon the theory that the rent reserved in the renewal was fixed with reference to the existence of the elevated railroad in front of the premises, for the reason that the injury inflicted upon the lot, apart from the building, was the only element which could be considered in fixing such rent, and also because the lessees' ownership of the building obliged them to accept the renewal lease upon the best terms they could obtain;

That the fact that an interest in the renewal lease had been assigned to the plaintiff Alfred Storms, without the consent of the city, as required by a covenant contained in the original lease, did not prevent a recovery by the plaintiffs, for the reasons that the city had consented to several assignments of the lease before the assignment to Alfred Storms, and that the defendants, being trespassers, were not entitled to take advantage of the covenant;

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That the defendants, upon paying the damages awarded by the court, were entitled to receive a complete title to the easements which the plaintiffs claimed were appurtenant to the demised premises under the then existing or any subsequent renewal under the terms of the lease, and not simply a conveyance of the right to operate the railroad until the expiration of the then present renewal lease.

*Semble*, that under a lease containing a covenant against assignments without the consent of the landlord, if the landlord gives a consent to one assignment, the covenant against assignments is satisfied and subsequent assignments may be made without his consent.

VAN BRUNT, P. J., and McLAUGHLIN, J., dissented.

APPEAL by the defendants, The Manhattan Railway Company and another, from a judgment of the Supreme Court in favor of the plaintiffs, entered in the office of the clerk of the county of New York, on the 21st day of February, 1902, upon the decision of the court rendered after a trial at the New York Special Term.

*Alfred A. Wheat*, for the appellants.

*Eugene D. Hawkins*, for the respondents.

O'BRIEN, J.:

Two actions were brought involving the question of damages to the premises Nos. 76 and 78 Park Row in the city of New York, by reason of the construction and maintenance of defendants' elevated railway. This action involved No. 78 Park Row which has a frontage of twenty-five feet and a depth of ninety-six feet. The necessity of considering to some extent the two actions together arises from the fact that the premises are used together practically as one building, four stories in height, for a hotel, restaurant and saloon business and have so been used since 1871. The construction of the elevated railroad in front of the property was commenced in 1878 and the road was completed and put in operation in 1879. The premises were leased by the city of New York on May 1, 1872, to Francis J. Leggett for a period of twenty-one years at \$1,375 a year rent, the lease containing a covenant of renewal upon terms to be agreed upon by the parties or determined by two appraisers or by an umpire, should the appraisers disagree.

On the expiration of this lease, which by mesne assignments came to the plaintiff Frances Storms, a renewal lease for twenty-one years from May 1, 1893, was executed to her. On September 7, 1875,



the city of New York gave its consent to the construction and operation of the elevated railroad in front of the property.

The appellants insist that the plaintiffs were not legally entitled to any award; and, if in error in this, then that the amounts awarded as damages are excessive. The sum awarded as damages to the leasehold was \$2,750, and the past damages were fixed at the rate of about \$400 per year. Thinking as we do that there was evidence to support the amounts awarded, we do not think it necessary to discuss the subject further or to interfere with the conclusions reached by the judge at Special Term.

The more serious questions bear upon the right of the plaintiffs to relief of any kind; and these it will be necessary to briefly consider. It is insisted that the plaintiffs have no title to the easements in the street, as those easements had been extinguished by the city of New York prior to the lease under which plaintiffs claim; and the authority relied upon for this proposition is the case of *Herzog v. New York El. R. R. Co.* (76 Hun, 486). The distinction to be noted, however, between that case and the case at bar is evident. In the *Herzog* case the city, as owner of the premises, prior to its conveyance to the plaintiffs, had given its consent to the operation of the elevated railway. In this case the original lease from the city to Leggett was given in 1872, prior to the city's consent to the elevated railroad; and the present lease is a renewal of that lease, given pursuant to the covenant of the city to renew upon the determination of the ground rent in the manner specified.

The case of *Kearney v. M. E. R. Co.* (129 N. Y. 80), based on this difference in the evidence between the two cases and showing that a different principle is applicable, we regard as decisive of the question. Therein, as here, it appeared that a lease was made with the privilege of renewal and before the renewal lease was executed the road had been built; and there also the point was made that as the plaintiff took the lease of the premises after the construction of the road, he had no right to subsequent damages or to equitable relief. As stated in the opinion in that case, "the first point ignores the fact already pointed out that plaintiff's title accrued in 1866 and before the construction of the road. The lease of 1884 cannot be deemed a new or voluntary arrangement, but a continuation of the lease of 1863, which the plaintiff may have been obliged to

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enter into in order to preserve his existing rights. The plaintiff's rights under the lease of 1884 are but an extension of the rights acquired under the lease of 1863. He was for all the purposes of this case the absolute owner of the building since 1866, and we perceive no reason why he was not entitled to recover such sum as represented its diminished rental value in consequence of the construction, maintenance and operation of the defendants' railroad. This is not the case of a tenant under a lease made after the road was built, suing for an injury to his possession, but an owner under title acquired before that time, seeking to recover for loss of rents. As such owner of the building he could also recover such permanent injury as he sustained by the appropriation by the defendants of such easements as were taken and were appurtenant to the house and a part of it."

In the case at bar the plaintiffs were the owners of the building, and the destruction of part of the easements in front thereof, which were appurtenant to both the lot and building, necessarily damaged the plaintiffs, and the existence of the lease deprived the city of the right to strip the premises of any of these appurtenant easements as long as its lessees had the right of renewal. The *Kearney Case* (*supra*) would, concededly, be a controlling authority were it not that in that case there was no formal consent by the owner of the lot to the construction of the road. The giving of such a consent, however, could not be effective as against the rights of the tenant for the reason that, while the lease was outstanding and with a right to renewal which created in effect a continuous term, the city had no power as against the tenant to strip the premises of these easements. As correctly urged by the respondents, "While the lease is in force neither the title nor the possession, legal, equitable or actual, is in the city, but in the lessee. Any consent the city may have given the defendants subsequent in date to this lease was subject to the rights of the lessee thereunder, or under any continuance or extension of those rights by virtue of any right to the same given by that lease."

The appellants' second contention is that the plaintiffs have suffered no damage, the rent reserved in the lease of 1893 having been fixed with reference to the fact of the presence of the elevated rail-

road in front of the premises. This contention has been frequently urged against purchasers of the fee of property after the road was constructed, but even in cases where it appeared that because of the elevated road they paid a smaller price, they were allowed to recover damages. (*Korn v. New York El. R. Co.*, 39 N. Y. St. Repr. 322; *Werfelman v. Manhattan R. Co.*, 16 Daly, 356; *Sterry v. New York El. R. R. Co.*, 129 N. Y. 619; *Pappenheim v. M. E. R. Co.*, 128 id. 436.) And in regard to a lessee this question was considered in *Day v. New York El. R. R. Co.* (3 Misc. Rep. 616) and *Crimmins v. Met. El. R. R. Co.* (87 Hun, 187).

Apart, however, from these decisions, we think the reasons which should permit of recovery of damages in favor of a lessee who, under the terms of a lease, was obliged to take a renewal after the road was constructed, are much better and stronger than those which would sustain a recovery in favor of a purchaser who buys after the road is constructed and, in consequence, obtains the property at a lower price, because we know that where a tenant has established a business, with its good will depending to a great extent upon its location, and has erected upon the lot a building, he is to some extent in the hands of his landlord, and must, if he desires to reap the fruits of his industry, accept the renewal lease on the best terms he can obtain. We again advert to the fact that the plaintiffs here owned the building, and all that could have been considered in fixing the rent to be paid in the renewal lease would be the injury inflicted upon the lot.

The defendants' third contention is that plaintiffs have failed to show ownership because of the covenant in the original lease from the city against assignments and the assignment without the city's consent to the plaintiff Alfred Storms. The evidence shows, however, that the city consented to several assignments before the alleged assignment to Alfred Storms; and, furthermore, we do not think that the defendants, who are trespassers, are entitled to take advantage of the covenant, whatever might be the rights of the city. *McAdam on Landlord and Tenant* (Vol. 1 [3d ed.], § 239) supports the respondents' contention that, if the landlord, under a lease containing a covenant against assignments without his consent, gives a consent to one assignment, the covenant against assignments is satisfied and subsequent assignments can be made without his consent. Such

assignment in any event did not render the lease void, but only created a situation under which the landlord could, by taking advantage of it, re-enter. This, however, the city has not done, but, on the contrary, it appears that the assignment was made in 1882, since which time the city has received the rent for fully twenty years, and in 1893, granted a renewal lease to the plaintiff, who was the assignee of the original lease.

The fourth point urged by the appellants, that the court erred in compelling them to take and pay for a release exposing them to other injunction and damage suits, is well taken. In return for the amount required to be paid, the defendants, by the judgment, were to receive only a release and conveyance of the easements and the right to operate their road until May 14, 1914, that date marking the expiration of the present renewal lease. As the plaintiffs' right to damages rests upon the theory that the former lease and the present lease constitute a continuous estate, it would seemingly follow that any subsequent renewals under the terms of the lease would be but a continuation of the old, and not the creation of a new estate. Taking the plaintiffs' demand for judgment and defendants' answer, under which both sought for equitable relief similar to what would be obtained by the award of commissioners in condemnation proceedings, we think that upon obtaining, as the plaintiffs have in this action, the equivalent in damages, the defendants are entitled to receive a complete title to the easements which the plaintiffs claim were impaired or destroyed. It follows that the defendants should obtain all the plaintiffs' rights in and to the easements, not limited by the present lease, but extending to any renewals.

We think the judgment should, therefore, be modified by striking out the limitations as to time, and requiring the plaintiffs to give, upon obtaining the sums awarded, a release and conveyance of all their easements, arising by virtue of the present lease or any renewals thereof in the streets affected by the railroad.

Judgment modified accordingly, and as so modified affirmed, without costs.

PATTERSON and LAUGHLIN, JJ., concurred; VAN BRUNT, P. J. and McLAUGHLIN, J., dissented.

McLAUGHLIN, J. (dissenting):

I cannot concur in the views expressed in the prevailing opinion. The facts bring the case, as it seems to me, clearly within the principle laid down in *Kernochan v. Manhattan Railway Co.* (161 N. Y. 339), and, if I am correct in this, then the judgment should be reversed.

On the 1st of May, 1872, the premises in question were leased by the city of New York to Francis J. Leggett for a period of twenty-one years. The lease contained a covenant to the effect that at the expiration of the term the lessee, "his executors, administrators and assigns," had the privilege of renewal, upon such terms and conditions as might then be agreed upon. The words of the lease, so far as the same related to renewal, were as follows: That it shall be "upon such rents and other terms and conditions as shall be agreed upon between the parties, or as shall be determined by two sworn appraisers, one of whom to be chosen by each of the said parties, or as shall be determined by a sworn umpire who shall be chosen by such appraisers in case they cannot agree, unless the said premises, or some part thereof shall, at the expiration of the said term hereby demised, be required for public purposes, in which case the said term shall not be renewed." On the expiration of the lease a renewal lease for twenty-one years from May 1, 1893, was executed to Frances J. Storms, one of the plaintiffs, and she and her husband, the other plaintiff, now hold all of the interest for which the award of damages in this case has been made. In 1875 the city of New York gave its consent to the construction, maintenance and operation of an elevated railroad in front of the premises described in the complaint, and in pursuance of which the elevated railroad, which it is claimed caused the plaintiffs' damage for which the award has been made in this action, was completed in 1879 and has since been operated. It was in operation when the plaintiffs took the new lease of 1893. The rent was then fixed by agreement between her and the sinking fund commission, the representatives of the city of New York, and, in the absence of evidence to the contrary, it must be assumed that if the construction, maintenance and operation of the defendants' railroad injured the leasehold interest, that that fact was taken into consideration in fixing the rent; in other words, if the defendants' road had damaged the property, the rent was fixed at a lower figure

than it otherwise would have been. I say this must be assumed in the absence of evidence to the contrary, because it is the only natural conclusion which can be drawn from the acts of intelligent persons. Intelligent people do not pay an increased rental of real estate for the purpose of recovering prospective damages in an action to be thereafter brought, and if this should be done, it might then well be seriously questioned whether a court of equity would permit its powers to be exercised for the purpose of permitting an agreement of that kind to bear fruit. The *Kernochan* case is much like this one. The reason there assigned for an affirmance of the judgment necessarily leads to a reversal here. Judge GRAY, during the course of the opinion delivered in that case, said: "But when, at the expiration of that period, in 1890, it became necessary under the provisions of the lease, to readjust the rent, the situation was that arbitrators were 'to determine what would be a reasonable yearly rent for the said piece of ground hereby demised during the next succeeding period of twenty-one years.' This language would seem, fairly, to import, as the duty of the arbitrators, that they should exercise their judgment as to a reasonable rent to be exacted of the tenants for the new rental period upon which the parties were about entering. Of course, the demised estate under this lease was all that the lessor could grant in the use of the *res*; which included all incidental easements. But, if its usable value is diminished, from an obviously changed condition of affairs, due to the acts of the authorities, or of those acting by delegation of the authorities, are the arbitrators not to consider it? Will they not, naturally, be presumed to consider it in viewing the property? They must fairly appraise the value of the land as it stands. All the facts relating to the situation of the property and the facilities for its enjoyment must, necessarily, be considered in determining its value. (*Livingston v. Sage*, 95 N. Y. 289.) I think it would be a violent presumption that the arbitrators determined upon the rent to be paid for the premises for the ensuing period of time by valuing their use without the presence of the railroad structure, and upon the supposition that it would be removed during the term. The court has found that the defendant's railroad is a permanent structure, and that fact is not disputed by the appellant; which only insists that it was not a fact which was admissible, or which may be

legally presumed to have influenced the determination of the arbitrators in fixing the future rent to be paid by the lessee. \* \* \* If, where a lease is made at a time subsequent to the construction of the elevated railroad, the lessor recovers damages because of the presumption that the rent reserved is based upon the reduced value of the property, the same principle should be applicable to a case like this, where during the lease the parties have stipulated that the rent to be paid for stated periods shall be determined by the arbitrators. There is a similar presumption that the appraisal for rental purposes is based upon the reduced value of the property."

I am of the opinion that the judgment appealed from should be reversed and a new trial ordered, with costs to the appellants to abide the event.

VAN BRUNT, P. J., concurred.

Judgment modified as directed in opinion, and as modified affirmed, without costs.

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LEROY B. CRANE, Respondent, v. JAMES GORDON BENNETT, Appellant.

*Libel — verdict of \$40,000 reduced to \$25,000 — exemplary damages, when proper — reckless publications — testimony of a magistrate who is the subject of the libel that evidence was insufficient to hold accused parties — letters written by him to the newspaper publishing the libel — his statement as to what part was and what was not true — an article appearing in another paper to correct the statements of a reporter thereof on the trial — copies of reports not admissible where the originals can be produced.*

In an action of libel, brought by a police magistrate in the city of New York, against the proprietor of a newspaper, which published, under circumstances authorizing an award of exemplary damages, articles falsely charging the magistrate with having been guilty of conduct in the exercise of his judicial duties which tended to degrade him in the public estimation and to hold him up to the contempt and scorn of the community as a hectoring, bullying, insulting magistrate who refused to give heed to a complainant who appeared before him and charged certain persons with the commission of outrageous crimes, a verdict of \$40,000 is excessive and will be reduced to \$25,000.

Evidence that the articles in question appeared in the defendant's newspaper while he was absent from the United States and that, before going abroad, he left with the editors, sub-editors and other employees of the newspaper a notice that it was an imperative rule that nothing reflecting upon the reputation of any

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person should be published in the newspaper until the truth of the same had been ascertained after strict investigation, will not prevent an award of exemplary damages.

The power to award exemplary damages in an action for libel is not restricted to cases where the publication was induced by actual malice, but extends to cases where the libel was recklessly or carelessly published.

Evidence that the first libelous article was prepared by one of the defendant's reporters from information which he had received from another and which he made no attempt to verify, and that the other articles were published after the plaintiff had protested against the first article and had declared in a letter written to the general manager of the defendant's newspaper that the contents of the first article were false, is sufficient to authorize a finding that the libelous articles were recklessly published.

Upon the trial the plaintiff may properly be permitted to testify that the evidence submitted to him as a police magistrate by the complainant, referred to in the libelous articles, was insufficient to warrant the detention of the persons whom she accused.

Letters written by the plaintiff to the manager of the defendant's newspaper, in which he denounced the libelous articles as being false and demanded an apology from the publishers of the newspaper, are competent as indicating actual malice in the publications subsequently made.

The propriety of allowing the plaintiff to state what parts of one of the alleged libelous articles were true and what parts were untrue is doubtful, but the error, if any, involved in permitting him to do so is not such as will warrant the reversal of a judgment in his favor.

Upon the cross-examination of a reporter of another paper, the *New York World*, who was sworn as a witness for the defendant, an article written by a third person from facts furnished by the witness and published in the *New York World*, relating to the episode referred to in the alleged libelous articles, may properly be admitted in evidence for the purpose of affecting the story which the witness had given on his examination in chief, especially where it appears that the whole of the *World* article was subsequently printed in the defendant's newspaper and was a part of the defamatory matter alleged in the complaint.

Where, upon the examination of a police captain as a witness for the defendant, such police captain refers to an entry in a book containing copies of the reports made by the witness to his superior officers, the entry in such book should not be admitted in evidence when it appears that the entry was not in the witness' handwriting, that he never compared it with the original report and that the original was accessible and could be obtained by a subpoena.

INGRAHAM and LAUGHLIN, JJ., dissented.

APPEAL by the defendant, James Gordon Bennett, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 22d day of January, 1901, upon the verdict of a jury for \$40,000, and also from an order entered in said clerk's office on the 21st day of



January, 1901, denying the defendant's motion for a new trial made upon the minutes.

*Flamen B. Candler*, for the appellant.

*Eugene Frayer*, for the respondent.

PATTERSON, J.:

In an action brought to recover damages for alleged libels published concerning the plaintiff, in the defendant's newspaper, the jury rendered a verdict for the plaintiff in the sum of \$40,000. The defendant appeals from the judgment entered upon that verdict and from an order denying a motion for a new trial.

The plaintiff was a magistrate of the city of New York in the borough of Manhattan. The matter of which he complains was published in four issues of the defendant's newspaper, namely, those of August 21, 22, 23 and 24, 1899. There are four causes of action set forth in the complaint, each publication being made a separate cause of action. They all relate to flagrant misconduct imputed to the plaintiff in the discharge of his official duty. The article first published by the defendant and complained of by the plaintiff is the most serious. The three subsequent articles are persistent repetitions of the matter charged in the first. In that article it is stated that on the 20th day of August, 1899, the plaintiff was presiding in the fifth district Magistrate's Court in the borough of Manhattan, and that on that day one Annie Rome made a complaint against four men of robbery and criminal assault perpetrated upon her at about one or two o'clock in the morning of Saturday, August 19, 1899. In giving an account of the case the article was headed:

“ATTACK ON WOMEN FROM THE BENCH.

Magistrate Crane Delivers Another Bitter Tirade  
Against the Sex and Causes Mrs. Rome to Faint.  
Declared Her Story False.

She had Accused Four Cab Drivers of Attacking  
and Robbing her Near Grant's Tomb  
at Two in the Morning.

Magistrate said any Woman out at that Hour  
Deserved to be Attacked.”

It then proceeds to state that the complainant Rome accused four cab drivers of having brutally attacked and robbed her, leaving her

unconscious in the road ; that a detective explained the case upon arraignment of the prisoners and asked that they be held upon the charge of assault and robbery ; that the woman declared that she had engaged a cab driver to take her to her home ; that instead of driving her there, the cabman she employed took her to Riverside drive and One Hundred and Twenty-fourth street, where four men attacked and robbed her ; she exhibited a finger, from which she said the cabman had torn her wedding ring, skinning the finger almost to the bone, and she showed how her clothing had been torn by her assailants. The article then proceeds to state as follows : "The magistrate listened to the woman's recital with apparent impatience (and said) : 'The idea of a respectable woman being out in the streets in the morning at that hour is absurd. It's monstrous to believe the story you tell. Who would believe the tale of a woman who was drunk and claimed that she was robbed? It's all rot and I don't believe it, and neither does anybody else.'

" 'Oh, don't, your honor!' begged the woman, growing pale. 'I was not drunk, as the police know well ; I am a good woman, and you do me a great injustice.'

" 'The woman was not intoxicated when she was brought to the station house,' declared detective Prunty. 'I will make an affidavit to that effect.'

" 'I don't want your affidavit,' replied the magistrate. 'No good woman ought to be out in the street at that time, and if she was attacked at that hour she deserved it. She could not expect anything better. I will not entertain the complaint of assault and robbery, because in the first place, I don't believe it, and in the second, the woman could not hope to receive more consideration from men at that hour.'

#### FELL FAINTING TO THE FLOOR.

" 'Oh, don't, don't! For God's sake, don't! I am respectable!' cried the humiliated and mortified woman, as she fell to the floor in a faint. The magistrate stopped long enough in his bitter tirade to instruct the attendants to pick up the woman and carry her to a bench near by, where after some minutes she was revived.

"Indignation at the magistrate's remarks was perceptible among the spectators and court attendants. The stern face of the magistrate showed neither sympathy for the woman nor regret at his

ungracious words. He ordered the clerk to change the complaint to one of disorderly conduct against John McDermott and John Lacey, two of the cabmen, and held them in \$300 bonds each to keep the peace for three months. Crowley and Martin Mulady, the others, were discharged.

"The police yesterday were bitter in their criticisms of the magistrate's course."

The three other articles are, as stated before, reiterations of the charges made against the plaintiff and, in some respects, they amplify them. They not only reassert but make the effort to substantiate the original charge. They also refer to alleged misconduct of the plaintiff in other cases that had been before him. In the second article published it is stated that it was "not the first time Magistrate Crane has figured in peculiar decisions;" that "on the same Sunday morning he declined to issue a warrant asked for by Edward J. Murphy, an agent of the Society for the Prevention of Cruelty to Children. The agent had with him (a child) whose left ear was torn and whose face and body were covered with bruises;" that several months ago the plaintiff was accused of saying from the bench that nine women out of every ten were liars, but when he saw that in print the next day he denied the declaration. Other matters of misconduct of the plaintiff are referred to in this article, but they do not require special consideration now.

In the third article it was said that the district attorney would give the grand jury a chance to investigate the ruling of the magistrate who had freed alleged robbers and that the police "stick to the statement of the tirade in court and the ignoring of evidence."

It is unnecessary to state in detail the contents of all the different articles. Enough has been referred to, or quoted, to show that what was published of and concerning the plaintiff, if false, tended to degrade him in the public estimation and to hold him up to the contempt and scorn of the community as a hectoring, bullying, insulting magistrate, who refused to give heed to a complainant who appeared before him making accusations of the gravest character against persons whom she charged with the commission of outrageous crimes. If the contents of the articles published in the defendant's newspaper were true, it is evident that the plaintiff was absolutely unfit to fill the judicial position he occupied.

The defendant, in his answer, undertook to justify the publications made and to set up the truth in justification. On the trial, evidence was given as to what took place in the Magistrate's Court on the twentieth of August. That evidence was, to some extent, conflicting, but the jury found that the account given in the defendant's newspaper of the conduct of the plaintiff on that occasion was false.

We do not understand the learned counsel for the defendant as claiming that if, upon the whole evidence, the jury were authorized to make that finding, the plaintiff was not entitled to a verdict; but his contention is, that under the proven facts of the case and under the law as it is settled in this State, the plaintiff was not entitled to recover exemplary damages. That contention is founded, in the first place, upon the fact that the defendant had no personal connection with the publication of the libelous articles and did not in any way personally participate in the preparation or circulation of them. When they appeared in his newspaper he was absent from the United States. Before going abroad, he left with the editors, sub-editors and others engaged upon his newspapers, a notice that it was an imperative rule of his office that nothing reflecting upon the reputation of any person or corporation should be published in either of his newspapers until after strict investigation the truth of the same had been ascertained. It is strenuously urged that this proof, which was introduced in support of allegations in the answer, in mitigation of damages, was such as to prevent an award of vindictive damages. We have heretofore decided that it was not, in cases where the same notice given by the proprietor of the newspaper was disregarded by those conducting it for him in his absence. (*McMahon v. Bennett*, 31 App. Div. 16; *Morgan v. Bennett*, 44 id. 323; *O'Brien v. Bennett*, 59 id. 623.) We see no reason for holding otherwise in this case, notwithstanding the elaborate argument of the learned counsel for the appellant. There is nothing in the recent case of *Craven v. Bloomingdale* (171 N. Y. 439) which sustains a contrary view. There the subject of punitive damages was under consideration in an action brought against a master for the act of his servant in causing an illegal arrest of the plaintiff in that action, and it was held that the charge of the trial judge instructing the jury that they had power, if they saw proper,

to award such damages, without instructing them that they could not be awarded unless there was proof that the acts of the servant were malicious, that the master was implicated with the servant therein, or had, either expressly or impliedly, authorized or ratified them, was erroneous. Here, however, is the case of a proprietor of a great metropolitan journal leaving it in his absence in the control of a general manager, of editors, of sub-editors and a staff of reporters. The authority is confided to them to carry on the general business of editing, publishing and circulating that newspaper. As was said by SPENCER, J., in *Andres v. Wells* (7 Johns. 263), where a man is the owner of a paper and gives over conducting it to another, he thereby constitutes him his general agent and is answerable for all his acts done in the execution of that trust, whether within or beyond the intention of the principal.

The notice the defendant gave to his employees cannot be construed as a limitation of authority, such as would absolve him from liability from the consequences flowing from their failure to conform their conduct to its requirements. It was intended for their guidance and direction and was a warning to them. Their acts in disregard of that warning must in legal effect be considered as if they were his own.

But the question of punitive damages is presented by the learned counsel for the appellant in another aspect. It is claimed that the trial judge committed error and misled the jury as to the degree of malice that would authorize an award of punitive damages. The court charged as follows: "It is the law of this State that a libel recklessly or carelessly published, as well as one induced by personal ill-will, will support an award of punitive damages. The plaintiff in an action of libel gives evidence of malice whenever he proves the falsity of the libel. I may here add that the basis of punitive or exemplary damages is the alleged malice. Unless you reach the conclusion that there is malice, there can be no award for exemplary damages. There can only be a recovery for actual damages, namely, damages to the feelings and to the reputation of the plaintiff." The court then further instructed the jury in these words: "A plaintiff in an action of libel gives evidence of malice whenever he proves the falsity of the libel. It becomes then a question for the jury, whether the malice is of such a character as

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to call for exemplary or punitive damages, and that question is not to be taken away from the jury because the defendant gives evidence which tends to show that there was in fact no actual malice, but when he gives evidence tending to prove the absence of actual malice, then it is the duty of the judge to submit to the jury the question as one of fact, whether such malice existed in the publication." That language is almost literally quoted from the dissenting opinion of DAVIS, P. J., in *Samuels v. Evening Mail Assn.* (9 Hun, 294), which dissenting opinion was adopted by the Court of Appeals (75 N. Y. 604) as its own, and states a rule which has ever since been regarded as settling the law in this State on that subject. But the learned judge also expressly charged the jury that there was no evidence in this case of ill-will on the part of the defendant or any of its employees; that is, any personal ill-will. He said, "When that (ill-will) is established in respect of a defendant, it is evidence of actual personal malice and will afford a basis for an award of exemplary damages. *That is not this case.* If, however, this publication is false and untrue, libelous in its character, then malice may be implied, and we have, instead of malice which grows out of ill-will, hatred or ill-feeling, what is known as malice in law or implied malice, and when that is established, then there is a foundation for exemplary or punitive damages, under the law of this State, and I have already laid down the rule particularly on that question and on that branch of the case." Referring to other portions of the charge to ascertain what the rule laid down in that connection was, we find that the court stated that "it is the law of this State that a libel recklessly or carelessly published, as well as one induced by personal ill-will, will support an award of punitive damages."

The charge must be considered as an entirety, and when we read what was said respecting punitive damages from implied malice, we must consider it in connection with the statement in the charge that a libel recklessly or carelessly published would entitle the plaintiff to punitive damages, as well as where the libel was inspired by personal malignity. The recovery of punitive damages in an action for libel is not restricted to cases of actual malice, but may be given for a libel recklessly or carelessly published, as well as one induced by personal ill-will. (*Smith v. Matthews*, 152 N. Y. 152.) Here the

trial judge stated that this was not a case of actual malice on the part of the defendant, and, in effect, that it was only by reason of implied malice from a reckless and careless publication of the libel that the defendant could be held liable for punitive damages, and such an instruction as that was approved also in *Smith v. Matthews* (*supra*). We find nothing in *Krug v. Pitass* (162 N. Y. 154), or the other cases cited by the appellant, in conflict with that view.

That the first of the libelous articles in this case was recklessly published the jury were authorized to believe from the evidence relating to the origin of that article, which was prepared by McQuade, a reporter, who had no personal knowledge of the occurrence of which he wrote, who received the information at second hand, and who, fully appreciating the serious character of the charges he made, failed to make proper verification of his statement before the article was sent to the defendant's paper for publication, and who had no actual ground for believing the statements of his article to be true before he sent it in. The other articles were published after the plaintiff had protested against the first article, and had declared in a letter written to the general manager of the defendant's newspaper that the contents of that article were false.

We have examined the various exceptions of the defendant, one of which relates to the plaintiff's being allowed to testify that the evidence submitted to him as a police magistrate, when the four men were arraigned before him on the charges of robbery and assault, was insufficient to hold them. That was merely a statement by the plaintiff of the reason for not holding the accused persons upon the specific charges Mrs. Rome made against them. It is also urged that the court was in error in striking out parts of the testimony of the witness McQuade, who wrote the first article published in the defendant's paper. McQuade, who received his information from one Lindley, who was a reporter of another newspaper, testified in effect that Lindley had informed him that his (Lindley's) assistant, Lynch, was present during the proceedings before the plaintiff on the twentieth of August; that Lynch made a written statement of what occurred at that time and placed it on Lindley's desk. McQuade wrote the article from the information he received from Lindley, and not having heard from Lindley anything further

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concerning the matter, he sent the article to the night editor of the defendant's newspaper. McQuade also testified further and in detail as to what took place between himself and Lynch on the day of the publication of the article, and to a full conversation he had with Lynch upon the subject of that article, and all of the testimony relating to that conversation was stricken out. It seems to have relation to the question of actual malice in the publication, but what was so stricken out was reinstated by the court and was before the jury when the cause was submitted to them.

Exceptions were also taken to the admission of letters written by the plaintiff to the manager of the defendant's newspaper, in which he denounced the articles of which he complained as being false, and demanding an apology from the publishers of the newspaper. These letters were undoubtedly offered as indicating actual malice in the publications subsequently made. They were competent upon that subject, although the case did not, as it went to the jury, turn upon that question, the judge specifically instructing the jury that actual malice consisting of personal ill-will or malignity was not in the case. Nor do we think it was error to allow the plaintiff to state what parts of the article published in the issue of August 23, 1899, were true and what untrue. The witness was not called upon to express an opinion, but to state facts, which he did in his answer, admitting the truth of some of the statements in the article and specifically pointing out other statements which he swore were false. This method of examination may be of doubtful propriety, but we do not think such an error was committed as requires a reversal of the judgment on that ground. Nor do we think it was error to admit in evidence the copies of the defendant's newspaper of July 28, 1899, and August 22, 1899. They were admissible upon the point of actual malice which the plaintiff undertook to establish, but which, as before stated, was eliminated from the case in the judge's charge.

An exception was taken to a ruling of the court admitting in evidence an article published in the *New York World* of August 21, 1899, commenting on the conduct of the plaintiff in connection with the inquiry into the Rome charges on the preceding day. That article was introduced on the cross-examination of Shober, a reporter for the *World*, called as a witness for the defendant. He



did not write the article, but gave the information from which it was written. The writer "got his facts wholly" from the witness. The article was used "for the purpose of affecting the story which this witness has given" on his examination in chief. But the whole of this *World* article was printed in the defendant's newspaper in its issue of August twenty-third, and is a part of the defamatory matter constituting the third cause of action set forth in the complaint. It was not error to receive it in evidence.

It was not error to reject as evidence the entry in the book referred to by acting Police Captain Norton on his examination as a witness for the defendant. That book contained only copies of reports made by the witness to his superior officers. He never compared it with the original report. It was not in his handwriting, but was written by Officer Murphy. The original was accessible and its production could have been compelled by subpoena. None of the other exceptions to the rejection or admission of evidence requires special consideration.

Notwithstanding the character of these libels, which were so grave as to entitle the plaintiff to exemplary damages, we cannot escape the conclusion that the amount awarded by the jury was altogether excessive, and that even as punishment that amount transcends all reasonableness and propriety. It is very true that damages are within the discretion of the jury, but even where they are awarded for punishment their very exorbitancy may show that in fixing the quantum the jury were actuated by passion. Section 999 of the Code of Civil Procedure, which permits the granting of a new trial for excessive damages, announces a rule, apparently of general application. In *Fry v. Bennett* (9 Abb. Pr. 45), which was an action of libel in which exemplary damages were awarded, it was said that the court would not interfere with the verdict of the jury unless such damages were so outrageous as to strike every one with the enormity and injustice of them so as to induce the court to believe that the jury must have acted from prejudice, partiality or corruption, as was held in *Coleman v. Southwick* (9 Johns. 51).

Here, as before remarked, we think the jury must have been influenced by passion or prejudice in rendering this enormous verdict, and we are of the opinion that a new trial should be granted

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unless the plaintiff stipulates to reduce the recovery to the sum of \$25,000.

The order denying the motion for a new trial and the judgment must be reversed, with costs, unless the plaintiff stipulates as above suggested. If that stipulation is given, the judgment and order will be affirmed, without costs to either party of this appeal.

O'BRIEN and HATCH, JJ., concurred ; INGRAHAM and LAUGHLIN, JJ., dissented.

Upon plaintiff stipulating to reduce the judgment as entered to the sum of \$25,710.06, judgment as so reduced affirmed, without costs ; in case such stipulation be not given, judgment reversed and new trial ordered, with costs to appellant to abide event.

JAMES RALPH PHILIPS, Appellant, v. MARTHA B. PHILIPS, Individually and as Executrix, etc., of F. STANHOPE PHILIPS, Deceased, Respondent, Impleaded with GRACE MACGREGOR PHILIPS.	77	113
	80	*604
	80	*605

*Action to determine the validity of the probate of a will — testimony of physicians based upon a diagnosis of incipient paresis made by one of them three years before the testator's death and contradicted by his subsequent condition — it does not require the submission of the case to the jury.*

Upon the trial of an action, brought under section 2653a of the Code of Civil Procedure to determine the validity of the probate of a will, the only evidence given by the plaintiff to support his contention that the testator was mentally incompetent at the time he executed the will was the testimony of three physicians, only one of whom had ever seen the testator. The last-mentioned physician, who had attended the testator some three years prior to the execution of the will and the death of the testator, testified that he then diagnosed the testator's illness as incipient paresis. The other two physicians testified, in answer to hypothetical questions based upon the assumption that the first physician's diagnosis was correct, that the testator was mentally incompetent at the time the will was executed.

Every physician or other person who was in a position to observe the testator during the three years prior to his death testified, on behalf of the defendants, that the development of the testator's ailment was inconsistent with the diagnosis that the testator was suffering from incipient paresis, and the physician who made such diagnosis admitted that, if the symptoms thereafter

appearing had been correctly stated by such witnesses, his conclusion that the testator was suffering from paresis was erroneous.

*Held*, that the plaintiff's evidence did not destroy the presumption of the testator's mental capacity nor the presumption which the Code of Civil Procedure provides shall follow the probate of a will.

That it was the duty of the trial court to direct a verdict dismissing the complaint.

The mere opinions of expert witnesses, based upon an erroneous hypothesis, cannot prevail as against facts opposed to such opinions testified to by a great number of competent observers.

APPEAL by the plaintiff, James Ralph Philips, from a judgment of the Supreme Court in favor of the defendant, Martha B. Philips, individually and as executrix, etc., of F. Stanhope Philips, deceased, entered in the office of the clerk of the county of New York on the 24th day of December, 1901, upon the verdict of a jury rendered by direction of the court sustaining the probate of the will of F. Stanhope Philips, deceased.

*George M. Curtis*, for the appellant.

*W. J. Curtis*, for the respondent.

O'BRIEN, J.:

The action was brought to determine the validity of the will of plaintiff's brother, F. Stanhope Philips, who died January 12, 1901. The will was dated September 24, 1900, and was admitted to probate on April 8, 1901. It gives to his wife, the defendant Martha B. Philips, all his estate, real and personal, and appoints her his sole executrix. The questions for our determination are whether or not, upon the evidence given at the trial, the plaintiff had the right to go to the jury on the subjects of testamentary capacity, undue influence and proper execution of the will.

Section 2653a of the Code of Civil Procedure provides that the issue as to the validity of a will "shall be tried by a jury \* \* \*." And in construing this section, it was held in *Dobie v. Armstrong* (160 N. Y. 584) that whether evidence was sufficient to warrant the submission of any of these questions to the jury is a question of law for the court, the opinion stating that "the trial court was not required to submit the question of the testator's mental capacity to the jury, merely because some evidence had been introduced by the

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party bearing the burden of proof. \* \* \* The Legislature never could have intended, and the statute does not compel the construction, that courts should hold that every case which is brought under section 2653a of the Code must be submitted to the arbitrament of a jury. \* \* \* Their verdict should proceed upon such evidence as would warrant the court, in its review of the facts, in holding that it actually tended to prove such mental unsoundness in the testator \* \* \*." The opinion concludes with this language: "Such cases are fraught with the gravest consequences, and I do not believe that a solemn testamentary disposition of property should be left to the decision of a jury upon mere surmise or upon inferences from facts which are as consistent with the one view as with the other." And the conclusion reached in that case was that the evidence produced by the contestant "was not of a nature that the jury could have properly proceeded to find a verdict upon it in his behalf, and, further, that, if such a verdict had been rendered, it could not have stood the test of a motion addressed to the court to set it aside."

The force of this last statement has been destroyed by the later case of *McDonald v. Metropolitan Street Railway Co.* (167 N. Y. 66), wherein it was held, as correctly stated in the syllabus, that "the court cannot in any case where the right of trial by jury exists and the evidence presents an actual issue of fact, properly direct a verdict; if in such a case it is dissatisfied with the verdict because against the weight or preponderance of evidence, it may be set aside, but a new trial must be granted before another jury, and the direction of a verdict under such circumstances is reversible error."

Upon the law as now authoritatively laid down by the Court of Appeals, therefore, a verdict cannot be directed for a plaintiff or defendant, no matter how great the weight or preponderance of evidence may be in his favor, where, on the other side, evidence has been given which presents an issue of fact and upon which the jury could properly proceed to find a verdict.

With this rule in mind we have examined the voluminous record presented on this appeal bearing upon the various grounds upon which the plaintiff assails the validity of his brother's will, and for the reason that, upon the subjects of undue influence and of proper

execution of the will, no sufficient *prima facie* case was made out by the plaintiff, we may dismiss their further discussion and center our attention upon the only serious question left, namely, whether upon the subject of testamentary capacity there was at the end of all the evidence a *prima facie* case in favor of the plaintiff entitling him to go to the jury. We start with the rule as to the order and effect of the proof necessary in cases of this kind laid down in *Dobie v. Armstrong* (*supra*), wherein it was said: "Ordinarily the burden of proof is upon the party propounding a will; but section 2653a of the Code of Civil Procedure, which is the authority for the maintenance of this action, places the burden upon the defendants, who contest the validity of the will, of establishing the testamentary incapacity of the testator. The probate of the will by the surrogate is made *prima facie* evidence of its due execution and validity."

The burden at the outset of the trial rested, therefore, upon the plaintiff of meeting the legal presumption in favor of the will arising from its probate, and to what extent he was successful we will briefly refer.

The plaintiff produced three medical experts, upon whose testimony he relies as presenting a *prima facie* case showing testamentary incapacity, one of whom alone, Dr. Dana, had ever seen the testator, and he had seen him only during the latter part of November and the first of December, 1897, some three years prior to his death and the making of his will, when, from the symptoms he then observed of the man's condition, he diagnosed his illness as the initial stage of paresis. Upon the conclusion thus formed by him, that the testator at that time was suffering from incipient paresis, as a foundation, were built up hypothetical questions propounded to the other two experts, and upon which alone were based their opinions of his incapacity when the will was executed in September, 1900.

The plaintiff's case, therefore, rests entirely upon the opinions of the experts, and the force and weight to be given to them must necessarily depend upon the truth or falsity of the facts embodied in the hypothetical questions upon which such opinions are founded. If it was demonstrated at the close of the evidence, as on this record we think it was, that the diagnosis in 1897, that the testator was then in the initial stage of paresis, was erroneous; and if there

was no sufficient evidence upon which the jury could find that it was true; and if in addition we find that assumptions were included in the hypothetical questions which had no basis in fact, then, clearly, as the plaintiff's case rests alone upon the answers to these hypothetical questions, there was not sufficient evidence upon the issue involved requiring its submission to the jury.

As said by Judge FINCH in *Griswold v. N. Y. C. & H. R. R. Co.* (115 N. Y. 64): "Medicine is very far from being an exact science. At the best, its diagnosis is little more than a guess enlightened by experience. \* \* \* And the wisest physician can do no more than form an opinion based upon a reasonable probability." Attaching, however, to the diagnosis here involved such weight as it is entitled to in the first instance as a diagnosis or a guess as to the testator's condition in 1897, it remains to determine whether there was any doubt at the close of the evidence as to Dr. Dana's error concerning the nature of the disease. He testified, as stated, that when the testator came to him for treatment his diagnosis was that he was in the initial state of paresis; and paresis, he says, is a condition pathologically called softening of the brain, accompanied with the symptoms of mental weakness, deterioration, physical weakness and depression, and almost universally fatal within from two to five years. He does not state, however, upon what facts he based his diagnosis, and admits that when he saw him in 1897 the testator was not irrational.

Opposed to the verity of this diagnosis, Dr. Starr testified for the defendant that the testator also came to him in December, 1897, and his diagnosis of his trouble was nervous exhaustion or neurasthenia, and that he did not observe any symptoms of paresis; that he went over his case carefully and concluded that the nervous exhaustion was temporary, and advised him to go to Europe, which he did, and when he returned he was well; that "there was an absence of any paralysis of the muscles of the eye, which is in favor of neurasthenia and against paresis; \* \* \* an absence of any tremor of his face or of his tongue (or) knees, all of which are in favor of neurasthenia and exclusive of paresis." Dr. Monroe, who also saw the testator in the summer of 1897, testified that he was feeling feverish at the time, and had a cold and the symptoms ordinarily called "grip," and that he advised him to go away, which he did; that in 1900

he was called in and found him suffering with enlargement of the kidney. Dr. Kinnicutt testified that the testator first came to him in 1898 "for some trifling indisposition," and in 1899 he diagnosed his trouble as a tumor within the chest cavity, either an aneurism or a cancer. It was further testified that these tumors or cancers increased, and their exact nature was determined upon the autopsy; and to them alone, constituting a disease apart from paresis, was ascribed by his physicians the testator's death. And the testator's physicians with other witnesses state that prior to his death, and on September 24, 1900, when the will was executed, the testator was rational, discussed various subjects intelligently, that his speech and manners were precise, and that he possessed continuity of thought and an excellent memory.

The plaintiff's expert, Dr. Ira Van Giesen, was asked the hypothetical question whether, assuming that the testator was sixty years old at his death in January, 1901, previously on friendly terms with his brother, writing him affectionate letters inclosing money and promising to provide for him in his will, which he failed to do, leaving all his property to his widow; that previous to 1897 he was a neurasthenic, and in 1897 was examined by an eminent alienist, who diagnosed his case as initial paresis of the insane; that subsequently he wrote perfectly coherent letters, and many months before his death developed painful tumors, and for many weeks prior to his death injections of morphia and codeia were administered daily for the relief of pain; "that about six weeks before his death he had delusions, imagining that a nurse who was caring for him was a ghost;" that during a conversation with his sister-in-law he showed incoherency of thought; that he was unable to sit up in bed and had to be propped up to sign his will and was much emaciated, and his signature was unlike his ordinary signature, so that those well acquainted with it could not recognize it, and the letter "e" was omitted from his middle name; that the autopsy, which did not include an examination of the brain, revealed various malignant tumors whose growth had covered many months, he was or was not on the 24th of September, 1900, of sound mind, sane or insane? He answered: "The answer is emphatic, the man could not have been of sound and disposing mind, and he must have still been insane." Thereafter he defined general paresis as "an organic affection of the

brain which is accompanied by progressive degrees of mental enfeeblement, and is characterized by certain rather distinctive and well defined symptoms which run a regular course and make a symptom complex, a disease that is of very frequent occurrence and pretty certain of recognition." And on cross-examination he testified: "Mr. Philips, three years after the diagnosis of general paresis, should have exhibited certain physical signs — certain signs of the body. He should naturally have had some interference with his speech, his articulation; it should have been upon the spanning order; he might have elided syllables or final letters of words here and there; he should have had certain irregularities of the pupils. He should have had a slight paresis of the corners of the mouth; he should have had a certain interference with his reflexes. His handwriting should, had he followed the average course of a general paretic, shown certain characteristic changes. His mental condition should have been apparent by a variety of manifestations. He should have exhibited the changeable and fitful delusions which the general paretic is filled with. He should have had the emotional conditions characteristic of that disease. He should have had the flickering and unstable attention which is indicative of that disease and, had he passed on to what is known as the second stage, when there is a still greater degradation of the mental organism, he should have been approaching or giving indications of the course of the disease towards dementia in which he was practically irresponsible." The doctor further added that if paresis existed and cancer subsequently developed, it would not aid the recovery from paresis; and he admitted that paresis is one of the most dramatic and easily recognized forms of insanity in its outspoken stages. Dr. Dana recalled, testified, referring to his diagnosis, that if there were never any symptoms after that, it would of course be affected and he should consider he had made a mistake; and that, assuming that Mr. Philips showed during the last months of his life no mental lethargy or stupor or lack of mental concentration, or interference with the train of thought, or failure of memory, and that there was continuity in his thought, that he had a good memory on various subjects, and impressed those with whom he talked as rational, that would make a difference in his opinion and he should consider him sane.



It appears, therefore, without contradiction, from the testimony of every physician or other person who was in a position to observe the testator during the three years prior to his death, that the development of the ailment from which he suffered and the causes which brought about his death were inconsistent with the diagnosis made in 1897, that he had incipient paresis, or the theory that he subsequently suffered from any such disease; and it will be further noticed that the physician who made the diagnosis, having been informed of the symptoms appearing thereafter and down to the date of the testator's death, frankly admitted that if such were the symptoms, he erred in his original conclusion that the testator was in the initial stage of paresis.

The nature of the symptoms which developed, and which in the doctor's opinion would show that he was in error, were proved by testimony which is unimpeached and uncontradicted. In this statement we have not overlooked the testimony that the testator on one occasion when he was with the plaintiff and his wife and gave them money which they accepted for a watch, went from one subject to another without completing the conversation, and they told him he was too weak to talk; but this is of such slight importance that we need not dwell upon it further, it not being contended that upon this testimony alone any conclusion as to the testator's incapacity could be founded.

With respect, therefore, to the diagnosis in 1897 we are, with the physician who made it, of the opinion, upon the evidence presented and not disputed as to the actual condition of the testator during the period from 1897 to the time of his death, that the original conclusion that he was afflicted with initial paresis was erroneous; whence it follows that all the force to be attached to the answers to the hypothetical questions asked of the medical experts is destroyed. Another fact assumed and not proved and embodied in the hypothetical questions and which it appears from the medical testimony was of great importance and strongly indicative of general paresis, was that the testator had a delusion, believing that his nurse was a ghost. Nowhere in the testimony do we find evidence that he had any such a delusion, and the only fact approaching it is that he had objected, as his attendant testified that many patients do, to his nurse wearing a white dress; and on one occasion when his nurse

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bent over him and awakened him from sleep, he was for the moment frightened.

As the record stood, therefore, at the close of the entire evidence, it appeared without contradiction that the opinions of the experts upon which the plaintiff's case rested, resulted from an erroneous diagnosis and the erroneous assumption of facts, which destroyed the probative force of such opinions and left the plaintiff's case barren of any evidence sufficient to justify the submission of the issue of fact to the jury as to the testator's mental incapacity. Evidence of such a nature did not tend to destroy the presumption of the testator's mental capacity, nor the presumption which the Code of Civil Procedure provides shall follow the probate of a will. Independently of these presumptions, however, the mere opinions of expert witnesses based upon an erroneous hypothesis cannot prevail as against facts when testified to, as in this case, by a great number of competent observers. (*Buchanan v. Belsey*, 65 App. Div. 62; *Delafield v. Parish*, 25 N. Y. 29; *Hagan v. Sone*, 68 App. Div. 60.)

It was the duty, therefore, of the trial court to direct a verdict dismissing the complaint, and the judgment thereupon entered and now appealed from should, we think, be affirmed, with costs.

VAN BRUNT, P. J., PATTERSON, McLAUGHLIN and LAUGHLIN, JJ., concurred.

Judgment affirmed, with costs.

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THE BOWERY BANK OF NEW YORK, Respondent, v. FRIEDA HART  
and MAX HART, Appellants.

*Mortgage to secure a note—when it does not require the payment of attorney's charges—an oral promise to pay them cannot be proved—taxable costs as a measure of compensation.*

Default having been made in the payment of a note made by Max Hart to the order of Frieda Hart and discounted by the Bowery Bank of New York, the bank placed the note in the hands of its attorneys who brought suit thereon. After the summons and complaint in the action had been served and before any other proceedings had been taken therein, Max Hart offered to pay the note in installments and to give a mortgage to secure the payment thereof. This

proposition was accepted and a mortgage was made to the bank requiring the mortgagor to pay the note, "together with all the costs and expenses incurred by said party of the second part in a certain action now pending in the Supreme Court of this State, wherein said party of the second part is plaintiff and said Max Hart and Frieda Hart are defendants."

After the execution of the mortgage, Hart failed to pay an installment due upon the note and judgment was entered by default for \$474.49, the balance due thereon. Thereafter the attorneys for the bank rendered a bill to it for \$150 for their services in the matter, which sum was a fair and reasonable charge. Subsequently Max Hart paid the judgment for \$474.49 and received a satisfaction piece thereof. The bank then brought an action to foreclose the mortgage, for the expense of \$150 incurred for legal services and attorney's fees in the matter, contending that, at the time the arrangement to accept the mortgage was made, Hart agreed to pay the expense that might be incurred in the suit and the attorney's charge for services to the bank.

*Held*, that the mortgage did not, by its terms, include the charges of the attorneys for any services rendered after its date, and that the verbal promises of Max Hart as to what he intended to pay were not competent to extend the obligation of the mortgage;

That, as it did not appear that the costs and expenses incurred by the bank prior to the time that the mortgage was executed and delivered exceeded the taxable costs in the judgment entered in the action brought upon the note, the payment of that judgment, with interest, operated to satisfy the mortgage.

O'BRIEN, J., dissented.

APPEAL by the defendants, Frieda Hart and another, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 29th day of March, 1902, upon the decision of the court, rendered after a trial at the New York Special Term, foreclosing a mortgage on real property.

*Joseph Rosenzweig*, for the appellants.

*James Z. Pearsall*, for the respondent.

INGRAHAM, J.:

The action was brought to foreclose a mortgage made by the defendants, the condition thereof being that if the mortgagors should well and truly pay to the mortgagees (plaintiff) "on or before the first day of February, 1901, the total amount now due and owing, with interest, by them, upon a certain promissory note, bearing date May 12th, 1900, made by said Max Hart to the order of said

Frieda Hart, for the sum of \$2,500, and payable 20 days after said date and endorsed by said Frieda Hart, and discounted and now held and owned by said bank, together with all the costs and expenses incurred by said party of the second part in a certain action now pending in the Supreme Court of this State, wherein said party of the second part is plaintiff and said Max Hart and Frieda Hart are defendants, then these presents shall become void, and the estate hereby granted shall cease, determine and be void." This mortgage was dated the 23d day of July, 1900, and was acknowledged and recorded on that day. The complaint alleges that on the 12th day of May, 1900, the defendant Max Hart made his certain promissory note, whereby twenty days after said date he promised to pay to the order of the defendant Frieda Hart the sum of \$2,500, and before the maturity of said note the defendant Frieda Hart duly indorsed the same, and the same came into the possession of the plaintiff in the usual course of its banking business; that at the maturity of said note the same was duly presented for payment at the place where it was made payable, and payment thereof duly demanded, which was refused, and that the same was duly protested for non-payment, of which the defendants had due notice; that the plaintiff commenced an action in the Supreme Court to recover the amount due upon said note, and that on or about January 17, 1901, the plaintiff duly recovered judgment against the defendants for the balance due thereon, viz., \$474.49; that on or about the 23d day of July, 1900, the said defendants, for the purpose of securing the payment of said note, together with all the costs and expenses incurred by the plaintiff in said action in the Supreme Court, made, executed and acknowledged and delivered to the plaintiff a mortgage, to foreclose which the action was brought; that the plaintiff has incurred an expense of \$150 for legal services and attorneys' fees in the matter of the suit hereinbefore referred to, but that the defendants have failed to comply with the terms and conditions of said mortgage by omitting to pay the said sum of \$474.49 and the said sum of \$150, which was payable under the terms of said mortgage on February 1, 1901, except that the defendants, on or about the 21st day of February, 1901, paid on account of said sum the sum of \$474.49, being the amount of the judgment recovered against them, and that there is now justly due and owing to the plaintiff upon such mort-

gage from the defendants the sum of \$150, with interest thereon from the 1st day of February, 1901.

The answer denies that the plaintiff incurred an expense of \$150 for legal services and attorneys' fees in the action against them upon the note; alleges that the judgment obtained against them was duly paid and said judgment satisfied of record and all sums secured by the said mortgage were fully paid and the said mortgage has been fully satisfied by the defendants; and asks as affirmative relief that the said mortgage be satisfied of record and that the complaint be dismissed.

Upon the trial the cashier of the plaintiff testified that the bank owed to its attorneys their bill for the cost of the collection of the note of \$150; that the defendant Max Hart stated to the bank that he was going to pay the note and all the expenses that the bank was put to; that this mortgage was obtained after the note was put in the attorneys' hands for collection. One of the attorneys for the plaintiff testified that in May, 1900, he received from the bank this note for \$2,500 and commenced a suit in the Supreme Court upon the note; that after their action was commenced the defendant Max Hart called upon the attorneys and asked to pay the note in installments at the rate of \$200 every two weeks, and said he would give a mortgage upon his property in Eighty-fourth street; that it was finally agreed that if Max Hart would pay all the expenses the bank had been put to in the matter, they would accept this agreement and take a mortgage; that Max Hart said he would pay these expenses and asked what they would be and was told that they would be the expense of running down the title, preparing a mortgage and recording it, putting in a short search, and also the expense that might be incurred in the suit and the attorneys' charge for services to the bank, and what the expenses would be, he was told that it would depend entirely upon the length of time it took and the amount of trouble they were put to in the collection of the claim; that the defendant said that was satisfactory. The attorneys then put in the search and ran down the title for which they charged Hart \$55, which he paid, and made an appointment for closing it, and on June 23, 1900, the mortgage was given; that during January, 1901, Hart having paid on account of the principal of the note up to about \$400 and then having failed to pay the balance, judg-

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ment was entered against him in that action for the amount due on the note and costs, which judgment then amounted to \$474.49; that on February 18, 1901, Hart paid the balance of the judgment and received a satisfaction piece, and at that time demanded a return of the mortgage, which was refused; that on February 1, 1901, the attorneys charged the bank \$150 for their services in the matter, and there was evidence tending to show that this sum was a fair and reasonable charge for the services rendered by the attorneys to the bank.

It seems to me that the mortgage did not, by its terms, include the charges of the attorneys for any services rendered after its date. The mortgage was conditioned upon the mortgagors paying the amount due upon the note, "together with all the costs and expenses incurred by said party of the second part in a certain action now pending in the Supreme Court of this State, wherein said party of the second part is plaintiff and said Max Hart and Frieda Hart are defendants." The condition of the mortgage thus being plainly expressed, the verbal promises of Max Hart as to what he intended to pay were not competent to extend the obligation of the mortgage, or import into the mortgage the obligation to pay any additional sum than that plainly expressed by the condition. Assuming that this would include a counsel fee in the suit which had been incurred at the time this mortgage was given, all that had been then done was the commencement of the action upon the note and the service of the summons and complaint upon these two defendants. There is no evidence as to the value of those services. The judgment was entered by default, and all that the plaintiff could be entitled to recover were the costs and expenses that had been incurred by the bank prior to the time that the mortgage was executed and delivered. There is nothing to show that these costs and expenses exceeded the taxable costs in the action brought upon the note, and upon the payment of that judgment, with interest, the mortgage was satisfied.

It follows that the judgment appealed from must be reversed and a new trial ordered, with costs to the appellant to abide the event.

VAN BRUNT, P. J., McLAUGHLIN and HATCH, JJ., concurred; O'BRIEN, J., dissented.

O'BRIEN, J. (dissenting):

Mr. Justice INGRAHAM fully states the facts, but I am unable to agree with his conclusion. While the action was pending in the Supreme Court to recover on the \$2,500 note, the mortgage was made which, in addition to the payment of the \$2,500, provided that the mortgagors should also pay "all the costs and expenses incurred" by the bank in that action. Construing the language employed and the intention of the parties, I think that what the mortgagors contracted to do was to save the bank harmless for "all the costs and expenses" in connection with the pending action. The incurring of a legitimate expense by the bank for counsel fee was proper and within the contemplation of the parties under the agreement. The bank having had the right originally to employ counsel in the suit and to contract to pay a reasonable fee for their services, which it appears it did, has the right to collect the same from the mortgagors. The only question, therefore, it seems to me, that arises in this case, is whether the sum charged for counsel fees is reasonable.

I think enough appears to show that \$150 is an excessive charge and that \$50 would be ample, in addition to the taxable costs. The mortgage being so conditioned that the payment of such a sum could be enforced, the judgment should be accordingly modified and as so modified, affirmed, without costs.

Judgment reversed, new trial ordered, costs to appellants to abide event.

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WOLF COHEN, Appellant, v. LEWIS KRULEWITCH, Respondent.

*Costs — when they should not be imposed as a condition of granting a new trial.*

Where a verdict in favor of a plaintiff is set aside on the ground that he failed to prove his case, there is no rule which requires that costs shall be imposed as a condition of granting a new trial.

In an action to recover commissions for procuring a purchaser of real property for the defendant, the questions whether there was an employment, whether the plaintiff procured a purchaser and whether the defendant ever agreed to pay him for so doing, were submitted to the jury which found a verdict for the plaintiff.

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The court set aside the verdict on the ground that there was no evidence that the purchaser was ever ready to sign the contract to purchase the defendant's property; no evidence that the contract between the defendant and purchaser was ever in fact prepared, and, therefore, no evidence that the plaintiff had obtained a person who was ready to purchase on terms satisfactory to the defendant, and that the weight of evidence was against the plaintiff.

*Held*, that costs should not have been imposed as a condition of granting a new trial.

HATCH, J., dissented.

APPEAL by the plaintiff, Wolf Cohen, from an order of the Supreme Court, made at the New York Trial Term and entered in the office of the clerk of the county of New York on the 25th day of November, 1901, setting aside a verdict theretofore rendered in favor of the plaintiff and directing a new trial of the action.

*Alice Serber*, for the appellant.

*Louis J. Vorhaus*, for the respondent.

INGRAHAM, J.:

The action was brought to recover commissions for procuring a purchaser of certain property belonging to the defendant. The plaintiff testified that he was employed by the defendant to procure a purchaser of this property; that he procured a purchaser therefor upon terms satisfactory to the defendant; that the defendant subsequently refused to complete the purchase and thereby the plaintiff became entitled to his commissions. The defendant denied the employment; denied that the plaintiff ever procured a purchaser of the property, or that he ever promised to pay him any commissions. The case was submitted to the jury who found a verdict for the plaintiff, whereupon the court, on motion, set aside the verdict and ordered a new trial upon the ground that there was no evidence that the purchaser was ever ready to sign the contract to purchase the defendant's property and no evidence that the contract between the defendant and the purchaser was ever in fact prepared, and, therefore, no evidence that the plaintiff had done what he contracted to do — obtain a person who was ready and willing to make an exchange with the defendant for the property that was satisfactory to the defendant, and also upon the ground that the weight of evidence was against the plaintiff, and as the plaintiff had the burden of proof the jury should have found for the defendant in the case and not for the plaintiff.



We think the court was entirely justified in setting aside the verdict for the reason assigned by the trial judge, and that the jury were not justified upon the evidence in finding a verdict for the plaintiff. The plaintiff insists, however, that the court should have imposed costs upon the defendant as a condition for granting the motion to set aside the verdict. Where a motion is made to set aside a verdict upon the ground that the plaintiff has failed to prove his case, there is no rule that requires that costs should be imposed as a condition for granting a new trial. In such a case a new trial is not granted as a matter of discretion, but as a matter of right, and we do not think the court would then be justified in imposing costs as a condition for granting a new trial. While it is proper for the court to impose costs upon granting a new trial where there was a proper case for the submission of the question to the jury, but where for some reason the court is satisfied that the verdict was not a fair determination of the question submitted to them or that justice requires that the case should be submitted to another jury, this is not such a case. Upon this record we think the court below was required to grant a new trial without the imposition of any costs upon the defendant.

It follows that the order appealed from should be affirmed, with costs.

VAN BRUNT, P. J., O'BRIEN and McLAUGHLIN, JJ., concurred ; HATCH, J., dissented.

Order affirmed, with costs.

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MORRIS PERLBERGER, Respondent, v. WILLIAM F. GRELL, as Sheriff of the County of New York, Appellant.

*The cost of store fixtures as evidence of value.*

The cost of store fixtures is competent evidence of their value.

APPEAL by the defendant, William F. Grell, as sheriff of the county of New York, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 15th day of March, 1902, upon the

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verdict of a jury, and also from an order entered in said clerk's office on the 19th day of March, 1902, denying the defendant's motion for a new trial made upon the minutes.

*Frank L. Crocker*, for the appellant.

*I. Henry Harris*, for the respondent.

INGRAHAM, J. :

The only question presented upon this appeal arises upon an exception to a ruling upon testimony as to the cost of certain fixtures which the witness stated that he placed in the building. The action was for a conversion by the defendant of certain merchandise consisting of groceries of the alleged value of \$3,470 and certain store fixtures of the alleged value of \$1,000. The defendant justified under a warrant of attachment issued out of the City Court against the property of Edward Arndt and Reynolds Arndt, the defendant alleging that under such warrant of attachment he levied upon certain goods and chattels of the character described in the complaint, and alleging that said goods and chattels were the property of the said defendants in the attachment action and that they had a leviable interest therein. The plaintiff testified that the fixtures consisted of counters, shelving, an ice box, show cases, scales and articles of this character, and that the reasonable value thereof was between \$600 and \$700. One Dokel, who purchased the property levied on, was called as a witness and testified that he made no change in the fixtures of that place since he purchased the business on the 5th day of July, 1901. One Moses was then called as an expert and testified that he went to the store on the Thursday before the trial and he valued the fixtures on the 14th day of June, 1901, the day of the conversion, making allowance for the wear and tear between the 14th day of June, 1901, and the day that he saw them, which seems to have been in the month of March, 1902, at between \$600 and \$700. On behalf of the defendant there was evidence tending to show that the value of these fixtures was much less than that specified by the witnesses for the plaintiff. Dokel was then recalled by the defendant and testified that the value of the fixtures and grocery at the time he purchased them was between \$600 and \$700; that the fixtures in the building were the same at the time of the trial as when

he took possession, except what shelving he put in. In answer to a question as to what shelving he put in, he said: "In the windows, and there was a big post in the middle of the store. I had eight or ten shelves put around there, about four or five feet, the window and the rolling door." He was then asked how much he paid for these improvements, which was objected to as immaterial, irrelevant and incompetent. The objection was sustained and an exception taken. He was then asked what in his opinion was the value of those fixtures, objection to which was also sustained, to which the defendant excepted. I think this testimony was clearly competent. Moses, who was the principal witness as to the value of these fixtures, testified that he did not examine them until three or four days prior to the trial. He must, therefore, have included the shelving that Dokel placed in the building in fixing the value of what he saw there, and as this shelving was not a part of the property converted by the defendant, the plaintiff was not entitled to recover its value. Assuming that the witness testified only as to the shelving he put there, there is nothing in the record to show what the value of that shelving was, or what proportion it bore to the total value of the fixtures in the building. Assuming that Dokel was not qualified to testify as to the value of the shelving that he supplied, there can be no question but that the amount that it cost was some evidence of value. The evidence was competent to show that the property that Moses saw in the store and upon which he based his testimony as to its value at the time of the conversion included property which was not converted by the defendant, so that the jury could have before them the value of that property and deduct it from the amount that Moses fixed as the value of the property that he saw and upon which he based his estimate of value.

It follows that the judgment and order appealed from must be reversed and a new trial ordered, with costs to the appellant to abide the event.

VAN BRUNT, P. J., O'BRIEN, McLAUGHLIN and HATCH, JJ., concurred.

Judgment and order reversed, new trial ordered, costs to appellant to abide event.

DANIEL TYRREL, Respondent, v. EMIGRANT INDUSTRIAL SAVINGS BANK, Appellant.

*Savings bank deposit—to establish a gift thereof there must be a delivery divesting the donor's possession and title.*

In an action brought against a savings bank to recover a sum of money deposited with such bank by one John Sweeny, the plaintiff testified that Sweeny had deposited some arrears of pension moneys in the defendant savings bank and in another savings bank, and that on the 31st day of October, 1891, he borrowed ten dollars of the plaintiff and went out with the plaintiff's son and one Clark to get a drink; that when he came back he said to the plaintiff: "'That money is a curse to me; I never can keep sober as long as I have it; you keep it. \* \* \* Take it and keep it.' \* \* \* He said the time he gave me that book the money in it was mine, 'Yours to keep.' I took the books and put them in a drawer of my desk. I says, 'Thank you, Doctor.'"

He further testified to a previous conversation with Sweeny, in which the latter said that "if anything ever happened to him he wanted me to have the money; that I had always been his friend, and he had no one else to give it to." A few days after delivering the bank books to the plaintiff Sweeny disappeared and was never heard from thereafter. The plaintiff made no claim against the bank for seven years after Sweeny's disappearance.

The plaintiff's son, in testifying to the alleged gift, stated that Sweeny said, "Boss, here is two bank books; that money in the bank belongs to you; I want to give it to you; this money has been an absolute curse to me," and that he handed the bank books to the plaintiff.

The witness Clark, referred to by the plaintiff in his testimony, testified that at the time in question Sweeny handed two bank books to the plaintiff, saying, "Here, use these two bank books that have been a curse to me ever since I have had them, for I cannot keep sober, and whatever is in the banks, these books is yours if anything happens to me."

*Held*, that it was error for the court to refuse to charge that "if Sweeny at the time of the alleged gift said that Tyrrel (the plaintiff) was to have the money if anything happened to him, that the jury should find for the defendant."

In order to establish a valid gift a delivery of the subject of the gift to the donee or to some person for him, divesting the donor of possession and title to the gift, must be shown.

APPEAL by the defendant, the Emigrant Industrial Savings Bank, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 8th day of April, 1902, upon the verdict of a jury, and also from an order entered in said clerk's office on the 21st day of April,

1902, denying the defendant's motion for a new trial made upon the minutes.

*Richard O'Gorman*, for the appellant.

*Theodore Prince*, for the respondent.

INGRAHAM, J.:

The action was brought to recover from a savings bank a sum of money deposited with the defendant by one John Sweeny. The complaint alleges that "on the 31st day of October, 1891, in consideration of certain monies given by plaintiff to said John Sweeny and of his then indebtedness to and friendship for plaintiff, he, said John Sweeny, made to plaintiff a gift of the said money then on deposit, being a portion of the money so deposited by him in said bank, and at the same time delivered to plaintiff the said bank or pass book, No. 272,115, as evidence of said gift, which gift plaintiff accepted, and which book plaintiff has ever since continuously held and kept, and still has, holds and keeps as evidence of the gift and money aforesaid;" and the complaint demands judgment against the defendant for the balance due on said deposit.

Upon the trial the plaintiff was called as witness and testified that Sweeny, the depositor, obtained from the government a pension and received at that time a sum of money for arrears of pension which he deposited in two savings banks, one of which was the defendant; that Sweeny came to the plaintiff on the 31st day of October, 1891, borrowed ten dollars, went out with the plaintiff's son and one Clark to get a drink and came back to the plaintiff and said: "'That money is a curse to me; I never can keep sober as long as I have it; you keep it. \* \* \* Take it and keep it.' \* \* \* He said the time he gave me that book the money in it was mine, 'Yours to keep.' I took the books and put them in a drawer of my desk. I says, 'Thank you, Doctor.'" He further testified to a previous conversation with Sweeny who said that "if anything ever happened to him he wanted me to have the money; that I had always been his friend, and he had no one else to give it to." Upon cross-examination the plaintiff testified that the conversation between himself and Sweeny was as follows: "He came in my office and says: 'Here, boss, here is my two bank books; as

long as I have got them and I can draw money I never can keep sober. Take it. That money is yours. I don't want it. It is only a curse to me.' He said he would try to live off his pension. He said I had always been a good friend to him and the only friend he did have." A few days after, Sweeny disappeared and has never been heard from since; for seven years he made no claim upon the bank for the money; in November, 1895, in proceedings against him as a judgment debtor he had testified: "I keep no bank account. The last time I had a bank account was in 1887. I kept an account in the 9th National Bank in the City of New York. I discontinued it about in 1868. I have no savings bank account." The plaintiff's son was also called and testified that he was present at this conversation; that after the plaintiff loaned Sweeny ten dollars, he, Sweeny, Unger and Clark went to a saloon and had a drink; that they returned to the plaintiff's place of business; Sweeny pulled out two bank books and said: "Boss, here is two bank books; that money in the bank belongs to you; I want to give it to you; this money has been an absolute curse to me," and that he handed the bank books to the plaintiff. Clark was called as a witness and testified that he was present at that interview; that when they returned from the saloon he saw Sweeny take two bank books out of his pocket and hand them to the plaintiff, saying: "Here, use these two bank books that have been a curse to me ever since I have had them, for I cannot keep sober, and whatever is in the banks, these books is yours if anything happens to me." The witness also testified that Sweeny had before made several statements to him, saying, if anything happened to him, he wanted the plaintiff to have everything in the banks. The case was tried in April, 1902, and these witnesses testified to a conversation between the plaintiff and Sweeny over ten years prior to the trial. The defendant offered no testimony and the court submitted the question to the jury as to whether there was a *bona fide* gift. After the court had charged the jury counsel for the defendant requested the court to charge that "if Sweeny at the time of the alleged gift said that Tyrrel was to have the money if anything happened to him, that the jury should find for the defendant." This request the court declined, to which the defendant excepted, the court saying, "It is for the jury here to say whether there was

a present gift under which the dominion and control of this property was intended to be transferred from John Sweeny to Daniel Tyrrel, the plaintiff in this action." I think the refusal to charge this request was error which requires a reversal of the judgment. The rule is elementary that "to establish a valid gift, a delivery of the subject of the gift to the donee or to some person for him, so as to divest the possession and title of the donor, must be shown." (*Young v. Young*, 80 N. Y. 430.) "An absolute gift requires a renunciation by the donor, and an acquisition by the donee of all interest in and title to the subject of the gift. A portion cannot be retained and the remainder disposed of." (*Curry v. Powers*, 70 N. Y. 217.) Here Clark, one of the witnesses to the transaction, swore that Sweeny, delivering these bank books to the plaintiff, said: "Here, use these two bank books that have been a curse to me ever since I have had them, for I cannot keep sober, and whatever is in the banks, these books is yours if anything happens to me." If this was the transaction, and the surrounding circumstances and the condition of the parties strongly tend to corroborate it, it is clear that there was no absolute gift of the money in the bank, but the intention was for the plaintiff to keep the bank books so that in the event of Sweeny's death he would be entitled to the moneys represented by them. There would be, therefore, no present intention to part with the absolute title to the money represented by the bank books necessary to make a valid gift. To the money represented by these bank books the plaintiff concededly had no title. It belonged to Sweeny. To sustain this action there must be convincing proof that what Sweeny intended at the time he delivered the bank books to the plaintiff was that the absolute title to the money on deposit should vest in the plaintiff and that Sweeny intended to and did part with all dominion and title to it by a transfer of it to the plaintiff. If his intention was to give these books in the plaintiff's keeping so that upon his death what was left in the bank should be the property of the plaintiff, there was not a valid gift that would entitle the plaintiff to recover; and I think the defendant was entitled to have the jury instructed that, if that was the intention of Sweeny at the time of the delivery of the bank books, the defendant was entitled to a verdict. I am also of the opinion that upon this testimony the verdict is against the weight of evidence. The gift depends upon a

conversation happening over ten years before the trial, of which no record was kept. Sweeny was evidently quite dissipated and was rapidly using up this money in dissipation. The plaintiff had tried to induce him not to draw the money from the bank, but to live upon his pension. He stated at the time he delivered the books to the plaintiff that that was his intention, and then he characterized the delivery as a gift of the bank books. It is quite easy to see that a slight change in the words used would have materially changed the evidence of Sweeny's intention. The probabilities are against his intending absolutely to part with the title to the money, and the plaintiff and his son who testified as to these words were interested witnesses; then the conduct of the plaintiff after this transaction and after Sweeny's disappearance in failing for upwards of seven years to make any claim upon the bank for the money and in testifying positively that he had no savings bank accounts in supplementary proceedings is strong, if not conclusive, evidence that he did not understand that Sweeny by this transaction had intended to transfer an absolute title to this money to him. If Clark's version of the transaction is true, this would account for Sweeny's failure to press his demand for the money, and he could justly testify he was not the absolute owner of these bank books until Sweeny's death had been established. I do not think that we have here such clear and convincing testimony as would justify the jury in finding that Sweeny intended to divest himself of this money and vest it in the plaintiff.

The judgment and order should be reversed and a new trial ordered, with costs to the appellant to abide the event.

VAN BRUNT, P. J., O'BRIEN, McLAUGHLIN and HATCH, JJ., concurred.

Judgment and order reversed, new trial ordered, costs to appellant to abide event.



In the Matter of the Application of the CITY OF NEW YORK, Respondent, the Successor of the MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK, for the Appointment of Commissioners of Assessment under Chapter 339 of the Laws of 1892, an Act Entitled, etc., as Amended by Chapter 548 of the Laws of 1894, by Chapter 594 of the Laws of 1896, and by Chapter 613 of the Laws of 1898.

FREDERICK W. SANDER, Appellant.

*Appeal—it cannot be taken by one party for another—assessment for the cost of altering the grade of a railroad—until the commissioners decide that some part thereof is to be assessed upon the property of individuals the latter are not entitled to review the validity of the commissioners' appointment—constitutionality of such an assessment.*

A party to a special proceeding has no authority to take an appeal on behalf of others interested in the proceeding.

Chapter 339 of the Laws of 1892, as amended, authorizes the elevation of the New York and Harlem railroad between One Hundred and Sixth street and the Harlem river in the city of New York, and provides that the expense of the improvement shall be borne by the New York and Harlem Railroad Company and its lessee, the New York Central and Hudson River Railroad Company, and the city of New York in equal proportions; that, upon the completion of the work and payment of the city's share of the cost thereof, commissioners of assessment shall be appointed who shall view the improvement, fix the area of assessment, and assess all or part of the expense of the improvement upon the premises included in the area of assessment, or upon the city of New York. The statute does not provide that the property owners shall have notice of the proceedings before the commissioners, but does provide that the owners of property assessed may object to the assessment after the commissioners have made their report and shall be heard by the commissioners upon such objections.

*Held*, that, until the commissioners had determined to assess the cost of the improvement upon specific property, no one was aggrieved by their appointment, and that, consequently, an owner of property situated within the possible area of assessment could not prosecute an appeal from the order appointing them.

*Quære*, whether the Legislature had authority to provide that the expense of raising the grade of the railroad, which was apparently incurred in order to enable the railroad companies to comply with the United States statute requiring them to elevate their bridge across the Harlem river, should be assessed in whole or in part upon the specific property claimed to have been benefited.

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APPEAL by Frederick W. Sander, "in his own behalf and in behalf of over 350 other property owners, lessees, parties and persons interested in property in the City of New York within the possible area of assessment herein," from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 8th day of July, 1902, appointing commissioners of assessment.

*James C. Bushby*, for the appellant.

*John P. Dunn*, for the respondent.

INGRAHAM, J. :

The appeal from the order in this proceeding was taken by Frederick W. Sander, owner of the premises, etc., "in his own behalf and in behalf of over 350 other property owners \* \* \* interested in property in the City of New York within the possible area of assessment herein." We treat this as an appeal by Frederick W. Sander individually. We know of no authority by which a party to a special proceeding can appeal on behalf of others interested. In a proceeding of this character each person who appears becomes a party to the proceeding and, being such a party, can appeal only when he is aggrieved by an order made in the proceeding.

As a preliminary objection, the corporation counsel insists that the appellant, as an owner of real property abutting on Park avenue, cannot review an order appointing commissioners to determine whether or not any part of the sum paid by the city of New York for the elevation of the tracks of the New York and Harlem railroad and the New York Central and Hudson River railroad on Park avenue shall be assessed upon real property; and, in the event that any portion of the said sum should be assessed upon any specific real property, to make such assessment. The commissioners were appointed pursuant to the provisions of chapter 339 of the Laws of 1892.

By section 1 of that act it is provided that the grade of the New York and Harlem railroad, between One Hundred and Sixth street and the Harlem river, as now established by chapter 702 of the Laws of 1872, shall be changed and altered by elevating the grade above the surface of the street. Section 2 provides that "the viaduct

structure, as it now exists between One Hundred and Sixth and the south side of One Hundred and Eleventh streets, shall be adapted to the new grade line as established by the preceding section by raising its parapet walls and filling in with earth, or other materials, between the same, to the height required by the new grade; and from the south side of One Hundred and Eleventh street to the Harlem river the railroad tracks and roadbed shall be carried on a viaduct structure of iron or steel." Section 13 of the act provides that "there shall be a board whose duty it shall be to execute, direct and superintend the construction of the said improvement from One Hundred and Sixth street to the line of the Harlem river;" the said board to be appointed by the mayor of the city of New York, and it is authorized and directed to take entire charge and control of the said improvement from One Hundred and Sixth street to the Harlem river, and to execute the same in conformity with the provisions of the act. Section 14 of the act (as amd. by Laws of 1894, chap. 548) provides that when the plans, specifications and estimate shall be made and filed as before provided, "the expense and cost of the said improvement shall be borne and paid by the New York and Harlem Railroad Company or its lessee, the New York Central and Hudson River Railroad Company, and the Mayor, Aldermen and Commonalty of the City of New York, in equal proportions, as the construction of the said improvement progresses. When and as often as it shall appear by the certificate of the superintending engineer of the work of the said improvement duly certified by the aforesaid board that the sum of twenty-five thousand dollars has been expended thereon by either of said railroad companies, specifying the portions and divisions of the said improvement where the said expenditure has been made, the comptroller of the city of New York shall draw his warrant upon the treasury of the said city in favor of the treasurer of the said railroad company bearing and paying said expense for one-half of the said sum, \* \* \* and deliver it to the said railroad company for and on account of the one-half of the expense and cost of the said improvement to be borne and paid by the city as aforesaid." Section 15 provides for the issuing of bonds to provide the money for such payment, and such bonds are to be known as assessment bonds for the Park avenue improvement above One Hundred and Sixth street, and are to be

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issued by the comptroller at not less than par and for such period as the comptroller shall determine, not exceeding five years. Section 16 provides that "upon the completion of such work and final payment by the comptroller of the proportion of the cost of said improvement to be borne by the city of New York, the mayor, aldermen and commonalty of the city of New York, by the counsel to the corporation of said city, is hereby authorized and directed to make application to a Special Term of the Supreme Court in and for the first department for the appointment of commissioners of assessment, and the said court shall thereupon name three discreet and disinterested persons, being citizens of the city of New York, as such commissioners of assessment, for the purpose of performing the duties hereinafter mentioned in that behalf prescribed. Twenty days' notice of such applications shall be published in the City Record, and in at least two other newspapers published in the city of New York."

Although notice of this application is required to be given, there is no provision for hearing the owners of real property or other persons, and the section then continues: "It shall be the duty of said commissioners to view the improvement provided for by the terms of this act from One Hundred and Sixth street north to the Harlem river, and all such lands, tenements, hereditaments and premises as they may ultimately include within the area of assessment that may be fixed and determined by them, and shall proceed to determine the area upon which an assessment shall be imposed sufficient to meet and pay the entire amount of the assessment bonds which may be issued in pursuance of the provisions of section fifteen of this act, together with interest on such bonds to the date of the levying of such assessment, or such portion of said bonds and interest as the said commissioners of assessment shall determine should be paid by assessment. It shall and may be lawful to and for the said commissioners of assessment, in their discretion, if they deem it equitable and just so to do, but not otherwise, to assess the whole or any part of the said bonds and interest upon the mayor, aldermen and commonalty of the city of New York. Any area of assessment shall be made so as to include all such lands, tenements, hereditaments and premises as may by said commissioners be deemed to be benefited by the said improvement, and no others ;

and having fixed such area and the amount of said bonds, and the interest thereon to be paid by assessment, it shall be the duty of the said commissioners to make a just and equitable assessment of the benefit to the respective owners, lessees, parties and persons respectively entitled unto or interested in the lands, tenements hereditaments and premises included within the said area or \* assessment." Provision is then made for the confirmation of the report of the commissioners by the court, and it is provided that such report, when confirmed by said court, "shall be final and conclusive as well upon the said mayor, aldermen and commonalty of the city of New York, as upon the owners, lessees, persons or parties interested therein and entitled to the lands, tenements, hereditaments and premises mentioned in the said report, and also upon all other persons whomsoever." Section 17 provides that the said commissioners of assessment, at least thirty days before they present their report to the Supreme Court, shall deposit a true copy or transcript of the same in the office of the comptroller of the city of New York, and shall give daily notice, by advertisement in the newspapers mentioned in the 18th section of the act, for thirty days after depositing such report, as aforesaid, of the said deposit thereof in the said office, and of the day on which said report will be presented to the court; "and any person or persons whose rights may be affected thereby and who may object to the same or any part thereof, may, within thirty days after the first publication of such notice, set forth their objections to the same in writing to the said commissioners, who shall, after hearing the parties so objecting, thereupon reconsider their said assessment, or part or parts thereof so objected to, and in case the same shall appear to them to require correction, and not otherwise, they shall and may correct the same accordingly." Section 19 provides that the respective sums assessed by the commissioners upon the persons mentioned, in their said report and reported by them as and for the payment to be made by the parties and persons respectively in the said report mentioned or referred to shall be a lien or charge on the lands, tenements, hereditaments and premises in said report mentioned.

It thus appears that the only provision in the act which authorizes

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\* So in the original.— [REP.]

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the owners of property to appear and object to the assessment is that in section 17, which permits such objection to be made after the report of the commissioners is filed with the comptroller. The act does not provide that the owners of property shall have notice of the proceeding before the commissioners; but the owners of property upon whom an assessment shall be imposed may have their day in court after the assessment is imposed and notice thereof is given by the filing of the report and the publication of notice thereof. Until the commissioners have determined to assess the cost of this improvement upon specific property, there is no one whose property is affected by the appointment, and consequently no one is aggrieved thereby. The objection that the act is unconstitutional, so far as it authorizes the imposition of any assessment upon specific property, can be taken only when an assessment is sought to be imposed. It would have been competent for the Legislature to provide that the assessment should be made by the public authorities of the city of New York, as in the case of an ordinary street improvement; and all that the owners of property upon whom an assessment should ultimately be imposed can ask is that they shall have their day in court to be heard upon their objections to the imposition of an assessment. The statute provides that the owners of property upon which an assessment has been imposed may present their objection to the assessment, but that is after the commissioners of assessment have reported, when for the first time the specific property upon which it is proposed to impose an assessment will be specified.

The objection to the constitutionality of the provisions authorizing an assessment upon specific property for this improvement presents serious questions. The act provides for an elevation of the track of the New York and Harlem Railroad Company or of its lessee, the New York Central and Hudson River Railroad Company. There is nothing in the act to show that this improvement was designed for the benefit of the public, the city at large or the owners of abutting property, and it is not clear that the Legislature has authority to provide that an expense incurred for the benefit of these railroad companies, in order to enable them to comply with the law of the United States which requires them to elevate their bridge across the Harlem river, can be imposed upon specific property under the guise of an assessment. But this objection can only

be taken when an assessment is imposed upon some specific property, and as no such assessment has yet been imposed, we think the question is not presented upon this appeal.

It follows that the appeal should be dismissed, with ten dollars costs and disbursements.

VAN BRUNT, P. J., PATTERSON, HATCH and LAUGHLIN, JJ., concurred.

Appeal dismissed, with ten dollars costs and disbursements.

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In the Matter of the Probate of a Paper Writing Alleged to be the Last Will and Testament of WILLIAM A. RINTELEN, Deceased.

HARRY OVERINGTON, Appellant; ELIZABETH RINTELEN and LENA RINTELEN, as General Guardian of JOSEPH RINTELEN, an Infant, Respondents.

*Will — proof required to admit it to probate, where the attorney who prepares it and attends to its execution is a beneficiary thereunder.*

Upon a proceeding for the probate of a will it appeared that the decedent had no children; that his next of kin were a sister and an infant child of a deceased brother; that the decedent was addicted to drink, and that the proponent of the will, who, by the terms thereof, was appointed sole executor and given one-half of the testator's estate, was a lawyer to whom the decedent had given a sum of money which the proponent was accustomed to dole out to the decedent from day to day in sums sufficient to gratify his appetite for drink and to provide the means of existence. The will was drafted by one of the proponent's clerks and was executed in the proponent's office. The only persons present at the time of the execution were the decedent, the proponent and the two subscribing witnesses. One of the subscribing witnesses was a clerk of the proponent and the other a clothing dealer from whom the decedent was in the habit of purchasing clothes upon the order of the proponent.

The subscribing witnesses testified to the execution of the will in conformity with the requirements of the statute. Evidence was also given tending to show that the decedent was sober and of sound mind when he executed the will. There was no evidence of the testamentary intention of the decedent prior to the execution of the will or that he gave any instructions for its preparation or had any independent advice upon the subject.

*Held*, that the relations between the decedent and the proponent were such as to impose upon the proponent the burden of proving by evidence other than that

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of the formal execution of the instrument that it was the free, untrammelled and intelligent expression of the wishes and intention of the testator; That no such affirmative evidence had been given, and that the surrogate was justified in refusing to admit the will to probate.

APPEAL by Harry Overington, the executor nominated in, and a legatee under, a paper purporting to be the last will and testament of William A. Rintelen, deceased, from a decree of the Surrogate's Court of New York county, entered in said Surrogate's Court on the 27th day of March, 1902, refusing to admit said paper to probate.

*Francis B. Chedsey*, for the appellant.

*Gormly J. Sproull*, for the respondent general guardian.

INGRAHAM, J. :

The proponent was the executor of what purported to be the last will and testament of the decedent and he applied to have the instrument probated. The deceased had no children, his next of kin being a sister and an infant child of a deceased brother. The next of kin opposed the probate, alleging that the testator had not testamentary capacity; that the will offered for probate was not the free act and deed of the deceased, but was procured from him by undue influence, and that the said paper writing was not subscribed, published and attested as and for the last will and testament of the decedent in conformity to statute. (2 R. S. 63, § 40.) One of the subscribing witnesses to the will, a clerk of the proponent, testified that the will was executed in the presence of the proponent, who had acted as an attorney and agent for the deceased for some time before his death; that the proponent was present at the time of the execution of the will; that the will was read over to the deceased by the proponent and the deceased held the paper in the position that a person would hold it when reading it; that after that was done he sat down and signed the will and then declared it to be his last will; that the attestation clause was read over to him by the proponent and the deceased asked the two witnesses to sign; that at the time the testator signed the will he was not intoxicated; that his mental condition was very good indeed, and he was sober and of sound mind when he signed the will; that



there had been some \$1,500 left with the proponent, who was to pay it out when the deceased came for it; that the deceased came in almost every morning to get some money on account of that principal; that he was always quarreling with his sister, one of the contestants; that the instrument offered for probate was in the handwriting of one of proponent's clerks. The other subscribing witness testified that the proponent read some parts of the will over and then the deceased signed it, and after he had signed it the proponent asked him if that was his will, to which the deceased replied "yes," and then asked the witnesses to sign the will; that he said this after the proponent had asked him if this was his will; that the deceased was in the habit of getting drunk and of purchasing clothes from the witness, who was a dealer in clothing, upon the order of the proponent, the clothes being charged to proponent and paid for by him; that when the deceased executed this instrument he did not say over ten words; all that he said was "yes," and the request to the witnesses to sign; that the whole interview did not last over fifteen minutes. These two witnesses had been previously examined before the surrogate's clerk, and their testimony varied in some particulars, but they testified to the substantial facts required by the statute. Upon the examination of these two witnesses the proponent rested. Evidence was then introduced by the contestants which tended to show that the deceased lived in a cheap lodging house, paying a dollar a week for his room; that he was drunk almost every night, so that the porter had to put him to bed. There was also evidence tending to show that when he was sober he seemed to understand himself and what he was about, and there was no evidence of a lack of testamentary capacity, or that the making of this will was suggested to him by anybody. The learned surrogate in his opinion based his decision upon the personal relations that existed between the deceased and the proponent, and held that the circumstances were such as to make a case which required explanation, and which imposed upon the proponent the burden of satisfying the court that the will was the free, untrammelled and intelligent expression of the will of the testator; that this explanation had not been furnished and the burden of proof was not sustained. The only question on this appeal is whether the relation that existed between the deceased and the proponent, the executor and

principal beneficiary, and the facts surrounding the execution of the instrument were such as to cast upon him the burden of proving that the decedent understood the situation, intended to make the disposition of the property expressed in the will freely and without the improper influence of the principal beneficiary at whose instance the will was executed and expressed such intention by the execution of the instrument. That the proponent acted in a peculiarly intimate and confidential relation with the deceased is clear. He had in his possession an amount of money which he gave to the deceased in small sums necessary for the gratification of his appetite for drink and for his support from day to day. It is not stated in what form the balance of the deceased's property was invested, but the relation that existed between him and proponent placed the latter in a situation that gave him peculiar power to impose his will upon a man who seems to have had no association with his relatives. The proponent was not only the deceased's attorney, but also his banker and general agent from whom he received the means of living from day to day. When this instrument was executed the decedent was in the office of his attorney and confidential agent, the only ones present being in the employ of his attorney until the clothing dealer was sent for as a witness. There was nothing said in the presence of this witness to indicate that the decedent really had an intention of making such a disposition of his property, the conversation in the presence of this witness being simply answers to the proponent's questions. The decedent, so far as appears, had no independent advice as to the propriety of making such a disposition of his property; had not before expressed an intention of making such a disposition, and it does not expressly appear that the portion of the will which made his attorney a legatee was read over in the presence of the only witness who was not directly connected with the principal beneficiary. The will appointed the attorney and agent sole executor and left him one-half of the testator's property. In *Matter of Smith* (95 N. Y. 516) this question was discussed by Judge ANDREWS in delivering the opinion of the Court of Appeals, and the principle there established we think is conclusive in this case. There the proponent was the chief legatee under the will propounded for probate; was a lawyer who drew the will; was

the legal adviser of the decedent and was the residuary legatee. Judge ANDREWS says: "Undue influence, which is a species of fraud, when relied upon to annul a transaction *inter partes*, or a testamentary disposition, must be proved and cannot be presumed. But the relation in which the parties to a transaction stand to each other is often a material circumstance and may of itself in some cases be sufficient to raise a presumption of its existence. Transactions between guardian and ward, attorney and client, trustee and *cestui que trust* or persons, one of whom is dependent upon and subject to the control of the other, are illustrations of this doctrine. Dealings between parties thus situated, resulting in a benefit conferred upon, or an advantage gained by the one holding the dominating situation, naturally excite suspicion, and when the situation is shown, then there is cast upon the party claiming the benefit or advantage, the burden of relieving himself from the suspicion thus engendered, and of showing either by direct proof or by circumstances that the transaction was free from fraud or undue influence, and that the other party acted without restraint and under no coercion, or any pressure, direct or indirect, of the party benefited. \* \* \* The rule to which we have adverted seems, however, to be confined to cases of contracts or gifts *inter vivos*, and does not apply in all its strictness, at least, to gifts by will. \* \* \* The mere fact, therefore, that the proponent was the attorney of the testatrix did not, according to the authorities cited, create a presumption against the validity of the legacy given by her will. But taking all the circumstances together — the fiduciary relation, the change of testamentary intention, the age, and mental and physical condition of the decedent, the fact that the proponent was the draftsman and principal beneficiary under the will and took an active part in procuring its execution, and that the testatrix acted without independent advice, a case was made which required explanation, and which imposed upon the proponent the burden of satisfying the court that the will was the free, untrammelled and intelligent expression of the wishes and intention of the testatrix." In this case all the facts adverted to by the learned judge were present, except the change of testamentary intention, there being here no evidence of the intention of the decedent prior to the execution of the instrument offered for probate; and in this case we have the additional fact that the decedent

had been receiving from the proponent, from day to day, the money necessary for the gratification of his appetite and means of existence, placing the deceased in a position of dependence upon the proponent, and there is no evidence that the deceased gave instructions to prepare a will to any one. The entire absence of independent advice, or of instructions as to how the will should be prepared, or of knowledge of its contents, except so far as the instrument itself or some part of it was read over in his presence before its execution, and the absence of the communication of an intention to make a will to those who would be the natural objects of his bounty, are circumstances which are most important in considering the effect to be given to the proof of the actual execution of the instrument, and we think bring the case clearly within that class where there is imposed upon the proponent the burden of proving by evidence other than that of the formal execution of the instrument that it was the free, untrammelled and intelligent expression of the wishes and intention of the decedent. That burden being imposed upon the proponent, the case is bare of evidence that would justify a finding, aside from the formal execution of the instrument, that the decedent ever intended to make the disposition of the property expressed by the instrument; and without such affirmative evidence we think the learned surrogate was entirely correct in refusing to admit the will to probate. As was said by Judge ANDREWS in *Matter of Smith (supra)*: "The law is not so impracticable as to refuse to take notice of the influence of greed and selfishness upon human conduct, and in the case supposed it wisely interposes by adjusting the quality and measure of proof to the circumstances, to protect the weaker party and, as far as may be, to make it certain that trust and confidence have not been perverted or abused." In cases where a testamentary disposition is made of which those interested in the decedent's property have no knowledge until after his death, and when his lips are sealed so that if imposition has been practiced upon him there can be no remedy, the enforcement of this rule is essential for the protection of those who are powerless to protect themselves. If attorneys who prepare wills from which they derive substantial benefit allow them to be executed without insisting upon the testator having independent advice so that proof of his intention is available, they must take the consequence if their motives and acts are

questioned and instruments which give such advantage are refused probate because the actual free and untrammelled intention of the decedent is not proved. We think that upon the facts as they appear in this case the learned surrogate correctly determined that the proponent had not sustained the burden of proof imposed upon him and correctly refused to probate the instrument.

The decree appealed from should, therefore, be affirmed, with costs.

VAN BRUNT, P. J., PATTERSON, HATCH and LAUGHLIN, JJ., concurred.

Decree affirmed, with costs.

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THE PEOPLE OF THE STATE OF NEW YORK ex rel. JOSEPH ALBERT,  
Respondent, v. JOSEPH POOL, City Magistrate, Appellant.

*Habeas corpus — the writ will not be issued where the applicant has been admitted to bail — in case of his surrender by his bail it may issue.*

A person, who has been arrested upon a criminal charge and has been admitted to bail, is not entitled to a writ of certiorari or of habeas corpus, under section 2015 of the Code of Civil Procedure, "for the purpose of inquiring into the cause of the imprisonment or restraint," as the imprisonment or restraint referred to in the section is an actual physical restraint by which the liberty of the individual is in some way restricted.

If the relator should be surrendered by his bail and thus be actually in custody, he would be entitled to have the cause of his detention reviewed by such a writ of habeas corpus or of certiorari.

APPEAL by the defendant, Joseph Pool, city magistrate, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 4th day of September, 1902, sustaining a writ of certiorari theretofore issued in behalf of the relator and directing that said relator be discharged from custody.

*Robert C. Taylor*, for the appellant.

*Henry Cooper*, for the respondent.

INGRAHAM, J. :

On the petition of the relator, stating that he was restrained in his liberty within the State of New York, on that an information was laid against him by one Mary Kavanaugh, on a charge of

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grand larceny, and that after an examination held before the appellant, the police magistrate, he was held to answer the charge, a writ of certiorari was granted requiring the magistrate to certify to the court the day and cause of the imprisonment of the relator, together with all testimony taken before him. The magistrate made a return to this writ, from which it appeared that the relator was brought before him in the Magistrate's Court in the city of New York, upon oath of one Mary Kavanaugh that the relator had committed the offense of grand larceny by withholding and appropriating to his own use the complainant's property, in violation of section 528, subdivision 1, of the Penal Code; that the said relator appeared before the city magistrate by counsel, and it appearing that there was probable cause to believe the prisoner guilty of the charge, the magistrate fixed the amount of bail to be given at the sum of \$500, to answer at Special Sessions, as required by law, and he having given security in the said sum of \$500 to answer said charge as aforesaid, the magistrate thereupon discharged the said relator. There was also annexed to the return the information and the bail bond given to the magistrate by the relator. Upon this petition and return, the court sustained the writ and ordered that the relator be discharged from custody. The district attorney appeals upon the ground that, the relator not being in custody, the court had no power to discharge him and the proceedings should have been dismissed.

There was no writ of habeas corpus granted, the writ of certiorari being based upon the allegation of the relator that he was restrained in his liberty. The provisions of the Code of Civil Procedure (§§ 2120-2148) do not apply, as by section 2148 it is provided that "this article is not applicable to a writ of certiorari brought to review a determination made in any criminal matter, except a criminal contempt of court." By section 2015 of the Code of Civil Procedure it is provided that "a person imprisoned or restrained in his liberty within the State for any cause, or upon any pretence, is entitled, except in one of the cases specified in the next section, to a writ of habeas corpus or a writ of certiorari, as prescribed in this article, for the purpose of inquiring into the cause of the imprisonment or restraint, and, in a case prescribed by law, of delivering him therefrom."

To entitle the relator, therefore, to a writ of certiorari to review a determination in a criminal proceeding, it must appear that he was imprisoned or restrained in his liberty. Upon this application, as there was no traverse to the return, the return must be taken as true, and it must be assumed that upon the examination before the magistrate the relator was admitted to bail and discharged from custody. By section 576 of the Code of Criminal Procedure it is provided that, upon the allowance of bail and the execution of the undertaking, the court or magistrate must make an order, signed by him, for the discharge of the defendant, to the effect that the person charged with the crime having given sufficient bail to answer the same, the person in whose custody he is is forthwith commanded to discharge him from custody. Such an order was given, and thereby the relator was actually discharged from custody. The relator, therefore, was not restrained in his liberty and was not entitled to either a writ of certiorari or a writ of habeas corpus, under the provisions of the Code of Civil Procedure to which attention has been called. The imprisonment or restraint in his liberty, within the meaning of this section, is an actual physical restraint by which the liberty of the individual is in some way interfered with. A person cannot be said to be restrained in his liberty when he can do what and go where he pleases. The mere fact that his bail has authority to surrender him to custody at any time is not a restraint of his liberty. That a person is liable to an arrest or imprisonment, in the absence of any actual restraint, does not authorize either a writ of habeas corpus or a writ of certiorari to determine whether or not he is subject to be imprisoned in the future. If the relator should be surrendered by his bail, and thus be actually in custody, he would be entitled to have the cause of his detention reviewed; but until there is an actual restraint of his liberty, he is not entitled to either of these writs specified in section 2015 of the Code of Civil Procedure; and this view has been uniformly adopted in this State when the question has come before the court.

In *Matter of Lampert* (21 Hun, 154) the General Term of this department held that a person who had given bail upon the limits was not in custody so as to entitle him to a writ of habeas corpus directed to his bail. Mr. Justice BARRETT, in delivering the opinion

of the court, said that the same "has been held as to persons discharged on bail generally. They will not be considered as restrained of their liberty so as to be entitled to a writ of habeas corpus directed to their bail. \* \* \* Whatever may be the special characteristic of the restraint, however effected or imposed, it must at least be substantial and real. Mere moral restraint will not do. It should be of such a tangible nature that the court may properly say to the respondent, except in cases of sickness or infirmity, 'you can bring the body here if you choose.'" This decision was followed in *People ex rel. Smith v. Biggart* (25 App. Div. 21), and such seems to have been the universal practice in the Supreme Court. The same view was taken by the Supreme Court of the United States in *Wales v. Whitney* (114 U. S. 564), and no case is cited by counsel for the respondent which justifies the court in interfering in this proceeding, unless there is an actual physical restraint so that the respondent has such control over the relator that he can produce him before the court in answer to the command of the writ.

It follows that the order appealed from must be reversed and the proceeding dismissed.

VAN BRUNT, P. J., O'BRIEN, McLAUGHLIN and HATCH, JJ., concurred.

Order reversed and proceeding dismissed.

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THE PEOPLE OF THE STATE OF NEW YORK ex rel. PATRICK J. BRENNAN, Respondent, v. THOMAS STURGIS, Commissioner of the Fire Department of the City of New York, Appellant.

*Municipal corporation — unexplained absence of a member of the fire department of New York city — what must be shown in the return to a mandamus to procure his reinstatement.*

Under section 735 of the charter of the city of New York, which provides, "Unexplained absence, without leave, of any member of the uniformed force (of the fire department), for five days, shall be deemed and held to be a resignation by such member, and accepted as such," the position of a member of the uniformed force, coming within the terms of the section, is the same as that of



a member who has resigned from the force, and no trial or action on the part of the fire commissioner is necessary, except to treat his absence as a resignation and accept it by dropping him from the force.

Where the commissioner seeks to justify his action in dropping a member of the uniformed force from the rolls under such section, he must allege, as a fact, that the member dropped was actually absent for five days and that his absence was unexplained.

In a mandamus proceeding, instituted by a member of the uniformed force, who had been removed, to procure his reinstatement, a return made by the fire commissioner alleging that the relator was charged by his foreman with being absent without leave for more than five days; that the commissioner had received a communication from the medical officers of the department stating that they had examined the relator and found him suffering from the effects of the abuse of alcoholic stimulants; that thereafter evidence was brought to the commissioner which satisfied him that the relator was guilty of the charge of being absent from duty without leave for more than five days, and that he thereupon made an order that the relator's name be dropped from the roll, is insufficient to defeat the application for reinstatement, as it does not allege that the relator was, as a matter of fact, absent without leave for more than five days and that such absence was unexplained.

APPEAL by the defendant, Thomas Sturgis, commissioner of the fire department of the city of New York, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 27th day of June, 1902, granting the relator's motion for a peremptory writ of mandamus requiring the defendant to replace the relator's name upon the rolls of the fire department of the city of New York and to restore him to the position of assistant foreman in said fire department.

*Terence Farley*, for the appellant.

*Louis J. Grant*, for the respondent.

INGRAHAM, J.:

The relator, a member of the uniformed force of the fire department, presented to the court a petition stating that on the 7th of March, 1902, he was removed from his position and his name was dropped from the rolls of the said fire department by the direction of the respondent, although no written charges had been preferred or made against him and no opportunity afforded him to be heard in his defense upon any charge as required by law. By the

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affidavit in opposition to this petition it appeared that the relator was, on February 14, 1902, charged by the foreman with being absent from his duties without permission for five days, namely, between the hours of twelve o'clock noon on the 8th day of February, 1902, and twelve o'clock noon on the 13th day of February, 1902; that on February 27, 1902, the said foreman made another charge of absence without leave against the relator, namely, for being away from his duties for thirteen days and twenty hours; that on February 20, 1902, the commissioner received a report from the medical officers of the fire department which certified that they had examined the relator and that he was then suffering from the effects of the abuse of alcoholic stimulants, and whatever evidence of mental derangement existed was attributable to the above cause; that thereafter evidence having been brought to the commissioner which satisfied him that the relator was guilty of the charge of being absent from duty without leave for more than five days, the commissioner ordered that the relator "is hereby deemed and held to have resigned from this Department, and his name will be dropped from the rolls from 8 o'clock A. M., March 7, 1902." No notice of any charges was given to the relator. He was, therefore, improperly dismissed under section 739 of the charter (Laws of 1901, chap. 466) which provides for the trial and conviction of a member of the uniformed force. The city, however, seeks to uphold his dismissal under section 735 of the revised charter which provides: "Unexplained absence, without leave, of any member of the uniformed force, for five days, shall be deemed and held to be a resignation by such member, and accepted as such." Under section 273 of the Consolidation Act (Laws of 1882, chap. 410, as amd. by Laws of 1884, chap. 180) it was provided: "Absence without leave of any member of the police force for five consecutive days, shall be deemed and held to be a resignation, and the member so absent shall, at the expiration of said period, cease to be a member of the police force and be dismissed therefrom without notice;" and we held in *People ex rel. Fahy v. York* (49 App. Div. 173; affd., 163 N. Y. 551) that by the absence of a member of the police force from duty without leave for five days, he ceased to be a member of the force, and when it was made to appear to the commissioners in any proper way that a member of the force has come

within its provisions, the duty was imposed upon them absolutely and without any trial or notice to dismiss him from the force. The difference in the language used in this section and in the 735th section of the charter is not, I think, material. What is important is that an absence for five days from duty unexplained amounts to a resignation, and it certainly could not be claimed that had the relator resigned from the force and his resignation been accepted by the commissioner, he would be entitled to a mandamus to reinstate him. If unexplained absence is equivalent to a resignation, then the position of the officer who has been absent for five days is the same as that of an officer who has resigned from the force; and, under such circumstances, no trial or action on the part of the commissioner was necessary, except to treat his absence as a resignation and accept it by dropping him from the force. But the essential fact that must appear in answer to the application to be reinstated is that the relator was absent for five days and that his absence had not been satisfactorily explained to the commissioner. The trouble with this case is that the affidavit in opposition to the application does not state that fact. The commissioner swears that the relator was charged with absence by his foreman; that he received a communication from the medical officers stating that they had examined the relator and found him suffering from the effects of the abuse of alcoholic stimulants, with a report from the chief of the sixth battalion to the medical officers, informing them that the drinking habit of the relator had to a great extent brought about his present condition, and thereafter evidence was brought to the commissioner which satisfied him that the relator was guilty of the charge of being absent from duty without leave for more than five days, and on March sixth he made the order that the relator's name be dropped from the roll. As the statute requires that the fact that there was an unexplained absence for five days should appear to justify the commissioner in dropping a member of the uniformed force from the rolls of the department, the commissioner must allege as a fact that the officer dropped was actually absent for five days from duty and that his absence was unexplained. In that case his absence would be treated as a resignation and justify the commissioner in dropping him from the roll; but in this case there is no allegation that the relator was as a fact absent, and without the statement of

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that fact the commissioner was not justified in discharging him from the department. For this reason we think that, on the facts as they appear upon the record, the action of the commissioner was not justified and that the mandamus was properly granted.

It follows that the order appealed from must be affirmed, with fifty dollars costs and disbursements.

VAN BRUNT, P. J., PATTERSON, HATCH and LAUGHLIN, JJ., concurred.

Order affirmed, with fifty dollars costs and disbursements.

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In the Matter of the Estate of SEABURY TREDWELL, Deceased.

SAMUEL LENOX TREDWELL, Individually, and as Trustee under the Will of SEABURY TREDWELL, Deceased, and as Administrator with the Will Annexed of SEABURY TREDWELL, Deceased, Appellant; SUSAN W. NICHOLS and Others, as Executors, etc., of EFFINGHAM H. NICHOLS, Deceased, and Others, Respondents.

*Revivor of a proceeding for an accounting by an executor who dies while it is pending — notice to all parties in interest — power of a surrogate, on an application to vacate an order, to grant other relief.*

A proceeding by Effingham H. Nichols for a judicial settlement of his accounts, as executor under the will of Seabury Tredwell, deceased, abated by the death of the said Nichols. Thereafter Samuel Lenox Tredwell, individually and as trustee under the will of Seabury Tredwell, deceased, and as administrator with the will annexed of Seabury Tredwell, deceased, upon notice to all the parties interested, obtained an order directing Nichols' executors to file an account of their testator's proceedings as executor of Seabury Tredwell, deceased. While this accounting was pending, Nichols' executors obtained an *ex parte* order reviving the proceeding for an accounting instituted by their testator.

Upon the return of the citation to attend such revived accounting, issued pursuant to the *ex parte* order, the surrogate, upon a motion made, under a citation returnable the same day as the citation issued under the *ex parte* order, by Samuel Lenox Tredwell, individually and in his capacity as trustee and as administrator with the will annexed, to vacate the *ex parte* order, held that, while the order reviving the proceedings should not have been granted *ex parte*, all the parties being then before the court, the order of revival could be granted, and for that reason refused to vacate the *ex parte* order.

*Held*, that all the parties interested in the estate were entitled to notice of any application to revive the original accounting, particularly as the question whether the surrogate had power to revive such proceeding was not free from doubt;

That the surrogate had no power to turn the application to vacate the *ex parte* order into one to revive the proceeding and grant the motion for revival, but that he should have vacated the *ex parte* order.

APPEAL by Samuel Lenox Tredwell, individually, and as trustee under the will of Seabury Tredwell, deceased, and as administrator with the will annexed of Seabury Tredwell, deceased, from an order of the Surrogate's Court of New York county, entered in said Surrogate's Court on the 1st day of July, 1902, denying his motion to vacate an *ex parte* order reviving a final accounting commenced by Effingham H. Nichols, as executor, etc., of Seabury Tredwell, deceased.

*Thomas Abbott McKennell*, for the appellant.

*J. Tredwell Richards*, for the respondents.

INGRAHAM, J. :

The facts that are necessary to determine the legal questions presented upon this appeal are as follows: Seabury Tredwell died in the year 1865; his will was duly admitted to probate on the 17th day of April, 1865, and letters testamentary were thereupon issued to Effingham H. Nichols, one of the executors named therein, on the 17th day of April, 1865. The executor seems to have filed several accounts, the last and final account having been filed on the 27th day of June, 1895, when, upon the petition of the executor, all of the parties interested were cited to appear in the proceeding. Objections to the accounts were duly filed, and on the 8th day of August, 1895, an order was entered referring the accounts to a referee. This reference proceeded before the referee, a large amount of testimony was taken, and certain questions were submitted to him. Before the referee had made and filed his report, and about the 4th day of November, 1899, Effingham H. Nichols, the executor, died, leaving a last will and testament appointing the respondents executors. The proceedings upon this accounting then appear to have been dropped, and subsequently letters with the will annexed upon the estate of Seabury Tredwell were issued to the appellant

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Samuel Lenox Tredwell. As such administrator with the will annexed, as trustee under the last will and testament of Seabury Tredwell, and individually, he presented an application to the surrogate, asking that the executors of the last will and testament of Effingham H. Nichols, the deceased executor of Seabury Tredwell, be required to account for the acts and proceedings of the said Effingham H. Nichols, as executor of the last will and testament of Seabury Tredwell, deceased; and in pursuance of that application, upon notice to the executors of Effingham H. Nichols, deceased, and all the parties interested in the estate, on the 25th day of March, 1902, after hearing the attorneys for the executors and others who appeared, a decree was entered whereby it was ordered, adjudged and decreed that Susan W. Nichols and others, as executors of the last will and testament of the said Effingham H. Nichols, deceased, "do, on or before the 18th day of April, 1902, make, render and file in the office of the clerk of this court an account of the proceedings of the said Effingham H. Nichols, as executor of the last will and testament of Seabury Tredwell, deceased, for the purpose of having the said account judicially settled." Subsequently a motion was made by the executors of Effingham H. Nichols to vacate this decree, which motion was denied and an order entered on the 9th of June, 1902, and from this order no appeal seems to have been taken. On the 11th day of June, 1902, one of the executors of the last will and testament of Effingham H. Nichols, the deceased executor of Seabury Tredwell, filed in the office of the Surrogate's Court an account of the proceedings of the said Nichols as such executor, as required by the decree of March 25, 1902; and on the 18th day of June, 1902, objections to such account were duly filed in the Surrogate's Court by the appellant, individually, as trustee, and as administrator with the will annexed of Seabury Tredwell, deceased, and an order was subsequently entered referring the said account and the said objections to a referee. On the 16th day of April, 1902, however, the executors of Nichols, the executor of Seabury Tredwell, had presented a petition to the Surrogate's Court setting up the institution of the accounting by Nichols as executor of Seabury Tredwell, and the death of Nichols, and upon that petition obtained from the surrogate an *ex parte* order, which revived the said proceedings insti-

tuted by Nichols, the deceased executor of the last will and testament of Seabury Tredwell, deceased, for a final accounting, so that the court could proceed with such accounting and determine all questions and grant any relief that it would have power to determine or grant in case such decedent had not died, and could judicially settle the accounts so filed, and directed the issuance of a citation requiring all parties interested in the estate to attend such settlement of the accounts. Subsequently, on the 13th day of May, 1902, the appellant, individually, as trustee, and as administrator with the will annexed of Seabury Tredwell, made a motion to vacate the order of April 16, 1902, and also to punish the said executors of Nichols for a contempt of court in having failed and neglected to file the accounts of the said Nichols as executor of the said Seabury Tredwell. That motion came on to be heard upon the return day of the citation issued under the order of April 16, 1902, and the surrogate seems to have held that the order reviving the proceedings should not have been granted *ex parte*, but should have awaited the return of the citations, but that all the parties then being before the court, the order of revival could then be granted, and that for that reason the *ex parte* order of April 16, 1902, should not be vacated; and thereupon an order was entered reciting all of the proceedings, and after hearing counsel for Samuel Lenox Tredwell, individually, as trustee, and as administrator with the will annexed, in support of the motion to vacate the order of April 16, 1902, reviving the proceedings, and in opposition to such citation issued pursuant to such order, and on motion of J. Tredwell Richards, attorney for the said executors of said Nichols, the motion to vacate the order reviving the proceedings was denied, and it was further ordered that the said proceedings for an accounting commenced by Nichols as such executor and trustee on the 27th day of June, 1895, be and the same were revived against his executors, and that the said accounting proceed.

We think that the court below should have granted the motion to vacate this *ex parte* order reviving these proceedings. When the application for this order of April 16, 1902, was made, the appellant had presented an application to the court and obtained an order upon notice to the executors of Nichols to render an account of Nichols' proceedings as executor of Tredwell, deceased. All the

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parties interested in the estate were by that proceeding before the court, and were entitled to notice of any application to revive a proceeding which had abated by the death of the executor who had instituted the proceeding for an accounting. Whether or not that proceeding should be revived was a judicial question to be determined by the surrogate, and whether or not the court had power to revive the proceeding was a question not free from doubt. The proceeding for an accounting had abated in the year 1899, at which time there was no authority for reviving such a proceeding that had abated by the death of the accounting party. In the year 1901, by an amendment to section 2606 of the Code of Civil Procedure, a provision was inserted that "on the death of any executor, administrator, guardian or testamentary trustee, while an accounting by or against him as such is pending before a surrogate's court, such court may revive said proceeding against his executor, administrator or successor, and proceed with such accounting and determine all questions and grant any relief that the surrogate would have power to determine or grant in case such decedent had not died." (Laws of 1901, chap. 409.) This provision was not retroactive, and would not have authorized the revival of a proceeding that had abated prior to its passage. By an amendment of this section in 1902 (Laws of 1902, chap. 349) it was made to read: "On the death heretofore or hereafter of any executor," etc. So the Surrogate's Court undoubtedly had power when the *ex parte* application was made to revive the proceeding, unless this provision is subject to the constitutional objection which is insisted upon by the appellant. But before such relief could be given, the administrator with the will annexed of the testator, and all those who were parties to the proceeding that had abated, were entitled to notice of the application, and this is especially so in this case, as, prior to the time the application for this *ex parte* order was made, a proceeding, on notice to the representatives of the deceased executor, to compel an accounting had been commenced and was then pending. The learned surrogate recognized that this application was improperly made *ex parte*, but upon the return of the citation required by the *ex parte* order granted an order reviving the proceeding. But we do not think that that can be sustained, because the citations that had been issued and served upon those



interested in the estate did not require these persons to show cause why the proceeding should not be revived. The order reviving the proceeding was absolute, and the citations only required an attendance on the accounting. The parties to the proceeding were not given notice that on the return of this citation an application would be made to revive the proceeding, and it was this notice that they were entitled to before the surrogate should grant an order reviving it. It is true that this appellant, who alone appeals from the order denying the motion to vacate this *ex parte* order of April 16, 1902, attended and was heard on that motion, but the motion that he was heard upon was his motion to vacate the *ex parte* order. No notice seems to have been given to him that an application would then be made to the surrogate to revive the proceeding. The parties were before the court on the motion to vacate the *ex parte* order, and he was not there to be heard upon an application to revive the proceeding. The appellant had moved to vacate the *ex parte* order reviving the proceeding—an order that had been irregularly granted—and it was error to turn that application to vacate that order into one to revive the proceeding, and then grant that motion, when no notice of an application for such relief had been given to him or to others interested in the estate.

For this reason, without passing upon the other questions presented, we think the order appealed from should be reversed, with ten dollars costs and disbursements, and the motion to vacate the *ex parte* order of April 16, 1902, granted, with ten dollars costs.

VAN BRUNT, P. J., O'BRIEN, McLAUGHLIN and HATCH, JJ., concurred.

Order reversed, with ten dollars costs and disbursements, and motion granted, with ten dollars costs.

EDWARD JACKSON, Respondent, v. THE UNION RAILWAY COMPANY  
OF NEW YORK CITY, Appellant.

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*Negligence — duty of motorman to stop a car to avoid a collision — not bound to anticipate that a pedestrian will retrace his steps — contributory negligence.*

In an action to recover damages for personal injuries it appeared that the defendant operated a double-track street railroad on Third avenue, at its intersection with One Hundred and Sixty-third street, in the city of New York; that the westerly track was used for south-bound cars and the easterly track for north-bound cars, and that the space between the two tracks was five or six feet in width; that on the morning of the accident the plaintiff, after stopping on the sidewalk at the southwest corner of One Hundred and Sixty-third street and Third avenue to permit a south-bound car to pass, proceeded to cross the tracks; that when he reached the space between the north and south-bound tracks, or else had one foot in such space and one foot still on the south-bound track, he observed that a north-bound car, which was about one hundred feet away when he started to cross the street, was proceeding faster than he expected; that when he made this observation he stopped and then stepped back upon the south-bound track and was almost immediately and without warning struck by a south-bound car, which he had not seen before. The car was stopped within five or six feet after it struck the plaintiff, thus showing that the motorman had it under control.

When the plaintiff started to cross the street the car which struck him was less than one hundred feet away, and it was not shown that the plaintiff had exercised any care to discover the approach of such car either before leaving the sidewalk or before stepping back upon the south-bound track.

*Held*, that there was no obligation resting upon the motorman to stop the car until the danger of a collision appeared, and that, in the absence of proof that the motorman could have stopped the car any sooner than he did after the plaintiff stepped upon the south-bound track, the motorman was not guilty of negligence;

That the motorman was not guilty of negligence because he did not anticipate that the plaintiff, after he had passed over the south-bound track, would retrace his steps in order to avoid a collision with a north-bound car;

That the failure of the plaintiff to look for the car which struck him before leaving the sidewalk or before stepping back upon the south-bound track constituted contributory negligence on his part.

O'BRIEN and HATCH, JJ., dissented.

APPEAL by the defendant, The Union Railway Company of New York City, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New

York on the 10th day of March, 1902, upon the verdict of a jury for \$2,000, and also from an order entered in said clerk's office on the 25th day of March, 1902, denying the defendant's motion for a new trial made upon the minutes.

*Charles F. Brown*, for the appellant.

*John Vernou Bouvier, Jr.*, for the respondent.

McLAUGHLIN, J. :

This action was brought to recover damages for personal injuries alleged to have been sustained by reason of defendant's negligence. Plaintiff had a verdict, and, from the judgment entered thereon, defendant has appealed.

Upon the trial it appeared that the defendant operated a double-track railway on Third avenue, at its intersection with One Hundred and Sixty-third street, in the city of New York, the westerly track being used for south-bound and the easterly for north-bound cars, and, from the testimony of plaintiff's witnesses, it appeared that between seven and eight o'clock in the morning of the 27th of June, 1899, the plaintiff attempted to pass over these tracks; that before doing so he stopped on the sidewalk at the southwest corner of One Hundred and Sixty-third street and Third avenue, to permit a south-bound car to pass; that after this car had passed, he proceeded at a "three-mile gait" until he had reached the space between the north and south-bound tracks, which was, according to his own testimony, between five and six feet, when a north-bound car, which he had observed about one hundred feet away when he first attempted to cross, was proceeding faster than he expected; at that time he was in the space between the north and south-bound tracks, or else one foot was in the space and one foot still on the south-bound tracks; that when he made this observation, he stopped and then stepped back upon the south-bound tracks, and almost immediately, and without warning, was struck and knocked down by a south-bound car which he had not seen before, and in this way sustained the injuries complained of.

There is no dispute but what the plaintiff was struck by the south-bound car, or that when the car was stopped he was under

the front platform; nor is there any dispute but what the south-bound car, when he first attempted to cross the tracks, was less than one hundred feet away.

The testimony of the defendant's witnesses tended to show that, when the south-bound car was only a few feet from the crossing, the plaintiff, without looking to see whether or not a car was coming, suddenly started to cross and was struck in about the center of the south-bound tracks.

At the close of plaintiff's case a motion was made to dismiss the complaint, which was denied and an exception taken. This motion was renewed at the close of the whole case, where a similar ruling was made and an exception taken.

We are of the opinion that the complaint should have been dismissed. The plaintiff was not entitled to recover, unless he established that his injuries were due to the negligence of the defendant and that his own negligence did not contribute thereto, and this he failed to do. Upon his own testimony it appears that he had crossed the south-bound track and had succeeded in getting into the space between the two tracks, when suddenly he stopped and then stepped back upon the south-bound tracks. The motorman of the south-bound car, manifestly, had his car under control, because he stopped it within a very few feet of, and before it had passed over, the plaintiff. It is true that the plaintiff was knocked down, but the record will be searched in vain to find any proof to the effect that the motorman of the south-bound car could have stopped it after the plaintiff stepped upon the south-bound tracks. That the motorman had his car under control is evidenced by the fact that the car was stopped within five or six feet, and there is no proof that it could have been stopped within any less space. There was no obligation resting upon the motorman to stop the car until the danger of a collision appeared. (*Stabenau v. Atlantic Ave. R. R. Co.*, 15 App. Div. 408; *Greenberg v. Third Ave. R. R. Co.*, 35 id. 620; *De Ioia v. Met. St. Ry. Co.*, 37 id. 455; *Johnson v. Third Ave. R. R. Co.*, 69 id. 247.) Nor was the motorman negligent because he did not anticipate that the plaintiff, after he had passed over the south-bound tracks, would retrace his steps in order to avoid a collision with a north-bound car. On the contrary, he had a right to assume, the south-bound car being farther away from the plaintiff than the

north-bound, that after the plaintiff had commenced to pass over the south-bound tracks he would continue in the same direction in which he was going until he had cleared those tracks, and if there was any danger of his colliding with the north-bound car, that he would remain in the space between the two tracks, instead of again stepping back upon the south-bound tracks. The plaintiff, therefore, failed to prove any negligence on the part of the defendant which entitled him to recover.

We are also of the opinion that the plaintiff's own negligence contributed to his injuries. There is no proof that he exercised any care, before leaving the sidewalk, to ascertain whether the car which subsequently struck him was approaching, nor is there any proof that he exercised any care in this respect before stepping back upon the south-bound tracks. But in answer to these suggestions it is said — not by counsel — that plaintiff cannot be said to be negligent for an error of judgment in acting, he at the time being in a dangerous position. There is no force in the answer, because if he were in a dangerous position it was by reason of his own negligence in that he had failed to observe the position of the south-bound car before he commenced to cross at all. (*Schneider v. Second Ave. R. R. Co.*, 133 N. Y. 586.) In the case cited the rule is stated as follows: "If the party by his own negligence has placed himself in a situation of peril, and being called upon in a sudden exigency to act, mistakes his best course, through an error in judgment, he is not thereby relieved. He is not, in such case, held for his error in judgment in failing to adopt the best means of escaping from a sudden peril, but he is liable for the original negligence which placed him in such peril, provided that negligence appreciably contributed to the happening of the accident." (See, also, *Hogan v. Central Park, N. & E. R. R. Co.*, 124 N. Y. 647.) That it was an act of negligence on the part of the plaintiff to step upon the south-bound tracks without ascertaining whether cars were proceeding on those tracks, cannot, we think, be seriously questioned, and especially in view of decisions bearing upon that subject. (*Woodard v. N. Y., L. E. & W. R. R. Co.*, 106 N. Y. 369; *Thompson v. Buffalo Railway Co.*, 145 id. 196; *Doyle v. Albany Railway*, 5 App. Div. 601; *Martin v. Third Ave. R. R. Co.*, 27 id. 52; *Biederman v. Dry Dock, E. B. & B. R. R. Co.*, 54 id. 291; *Madigan v. Third Ave.*

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*R. R. Co.*, 68 id. 123; *Johnson v. Third Ave. R. R. Co.*, 69 id. 247.)

Upon both grounds, therefore, we are of the opinion that the court erred in denying defendant's motion to dismiss the complaint, and for the error thus committed the judgment and order appealed from should be reversed and a new trial ordered, with costs to the appellant to abide the event.

VAN BRUNT, P. J., and INGRAHAM, J., concurred; O'BRIEN and HATCH, JJ., dissented.

HATCH, J. (dissenting):

I am unable to concur in the views expressed by Mr. Justice McLAUGHLIN in his opinion in this case. The evidence upon the part of the plaintiff, as gathered from the record, tends to establish that the plaintiff was engaged in crossing Third avenue at its intersection with One Hundred and Sixty-third street when he received the injuries of which complaint is made; that before he attempted to cross he noticed a south-bound car and stopped to let that car pass by him. After it had passed he continued on his way across. At the time when he paused for the south-bound car, he noticed a car coming upon the other track at a distance of about one hundred feet away. When he reached that track, he discovered that the car was coming faster than he had calculated, and that it was unsafe for him to attempt to cross in front of it. He was then in the space between the tracks, or was just about leaving the south-bound track. In this situation, he either remained with one foot on the rail of the south-bound track, or stepped back over the first rail of that track, and while in this position he was struck by another south-bound car. The latter car, as the testimony tends to establish, was seventy-five feet distant from the crossing behind the first south-bound car. The evidence further tended to establish that the motorman upon this car did not give any signals as it approached the crossing, and when his car was about ten feet distant from the plaintiff, he had his head turned in another direction. Upon this state of facts the jury were authorized to find and to characterize the conduct of the defendant as negligent, and to exonerate the plaintiff from contributory negligence. It was the duty of the motorman to be observant of existing conditions as he approached

the crossing, and this related not alone to the position in which the plaintiff was placed, but also to the operation of the car upon the north-bound track. There was nothing to obstruct his vision. The car on the north-bound track was coming directly towards him. The position of the plaintiff was in plain view. He was bound, therefore, in the discharge of his duty to take notice of the approaching car and the position of the plaintiff.

As the latter was upon the crosswalk and was engaged in passing over the street, the defendant had no paramount right to the use of the same at that point, and it was bound to manage and operate its cars with a due regard to the right of the plaintiff and not abridge his right to a safe passage. (*O'Neil v. D. D., E. B. & B. R. R. Co.*, 129 N. Y. 125; *Buhrens v. Dry Dock, etc., R. R. Co.*, 53 Hun, 571; *Zimmerman v. Union Ry. Co.*, 3 App. Div. 219.)

The defendant had created a situation of peril for the plaintiff. If he remained in the space between the tracks, he would be brought between two moving cars running in opposite directions, and such position, to say the least, is not free from danger. He was under obligation not to stand too close to the car, which he saw approaching on the north-bound track, and was bound to step far enough back to clear the overhang of the car. The space was quite narrow. Under such circumstances, if it was an error to step back so as to bring him over the rail of the other track, it was not such an act as to charge him, as matter of law, with negligence. The jury would be authorized to say that it was an error of judgment committed in an attempt to secure a safe place, and his act, therefore, would not necessarily be regarded as negligence. (*McClain v. Brooklyn City R. R. Co.*, 116 N. Y. 459; *Hergert v. Union Ry. Co.*, 25 App. Div. 218; 2 Thomp. Neg. [2d ed.], §§ 1449-1452, and cases cited.) The most casual observation upon the part of the motorman would have at once disclosed that the plaintiff had paused to permit the passage of the north bound car, and that the relative position of the plaintiff and such car made it dangerous for the plaintiff to attempt a passage before it passed, and seeing this situation the motorman was bound to observe the duty which charged him with the obligation of so operating the car and controlling the same as not to come in contact with the plaintiff. The evidence tends to establish that, instead of being attentive to his

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duties in this regard, he was looking in another direction, gave no signals and ran his car in utter disregard of the plaintiff's position and his rights upon the street. Of the existing situation the motor-man was bound to take notice. (*O'Malley v. Met. St. Ry. Co.*, 3 App. Div. 259; *affd.* on appeal, 158 N. Y. 674.)

The jury were, therefore, authorized to charge the defendant with negligence in the management and operation of the south-bound car. So far as the plaintiff's contributory negligence is concerned, the case is quite similar and, in application of legal principles, precisely like that of *McCormick v. Brooklyn City R. R. Co.* (10 Misc. Rep. 8), where the City Court of Brooklyn held that such question was for the jury, and this holding was affirmed upon appeal (150 N. Y. 584). The plaintiff had the right to assume that a car approaching upon either track would be operated, with a due regard to his right upon the street, and that it would be under control as it approached the crossing. (*Frank v. Met. St. Ry. Co.*, 58 App. Div. 100.)

The condition which brought the two cars at the same time to the intersection of this street was produced by the acts of the defendant, and, as it was chargeable with notice that pedestrians would cross the street at such point, it was bound to have its car under control for the protection of such persons. It is manifest, therefore, that the plaintiff cannot be charged with contributory negligence, as a matter of law, in stepping back to allow the north-bound car to pass, when he had the right to rely upon the proper discharge of all the obligations which the defendant was under to him. Under these circumstances, I think the question was properly submitted to the jury and the verdict rendered has sufficient evidence for its support. Nor do we think that error was committed in the admission of the testimony of the physician respecting the character of the injuries which the witness discovered at the time he made his examination. The injuries were sustained on or about the 27th day of June, 1899. The witness first saw him on July second of that year and made an examination. He made another examination on February 12, 1902. He was asked what he discovered upon the last examination, and objection was made that the testimony was too indefinite and not connected in any way with the injuries sustained from the accident. The basis of objection was that there was



no sufficient testimony to connect the conditions discovered by the physician in 1902 with the accident which was the basis of the complaint. The evidence of the plaintiff, however, was to the effect that his general health prior to the accident was good, that he had never known what sickness was, and that he had not met with any other accident or mishap since its reception. It is not contended but that the testimony of the physician was competent if the connection between the injury and the condition was established. The condition to which he testified was of the same character as existed when he first saw him on July 2, 1899, and was such as might have been produced by the injuries sustained, and this, coupled with the fact that the testimony of the plaintiff disclosed that he had never been ill and had met with no other accident since this one, sufficiently showed the connection to make the testimony competent and proper.

There are no other questions which require consideration. It follows that the judgment should be affirmed, with costs to the respondent.

O'BRIEN, J., concurred.

Judgment and order reversed, new trial ordered, costs to appellant to abide event.

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GEORGE W. QUACKENBOSS, Appellant, v. THE GLOBE AND RUTGERS  
FIRE INSURANCE COMPANY, Respondent.

*Execution of a contract by a corporation — when proof of the signatures thereto of its president and secretary and of the affixing of the corporate seal is insufficient.*

While, as a general rule, evidence that a contract, purporting to have been made on behalf of a corporation, was signed by the president and secretary of the corporation and bears the corporate seal, is sufficient *prima facie* to authorize its admission in evidence, yet where it affirmatively appears, when the contract is first offered in evidence, that the seal was affixed, not by the authority of the board of directors of the corporation, but by the authority and at the request of its president, and that after execution the contract, or a duplicate thereof, was kept in a safe to which only the secretary and treasurer had access, the general rule does not apply and further proof must be given to the effect that the president was authorized by the board of directors to direct that the seal be affixed.

APPEAL by the plaintiff, George W. Quackenboss, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of New York on the 8th day of March, 1902, upon the dismissal of the complaint by direction of the court after a trial at the New York Trial Term.

*Frederick Seymour*, for the appellant.

*W. P. Prentice*, for the respondent.

McLAUGHLIN, J. :

This action was brought to recover damages for the breach of an alleged contract between the plaintiff and the Rutgers Fire Insurance Company, which was subsequently consolidated with the Globe Insurance Company, and the obligations of the former assumed by the defendant.

The alleged contract was for a term of three years, with privilege of three renewals of three years each, and provided that, in consideration of plaintiff's services, he was to receive twenty per cent of the net premiums received by the insurance company upon all risks accepted and policies issued in certain localities. The answer denied the execution of the contract and alleged, affirmatively, that if such contract were made it was an *ultra vires* act and not binding upon the insurance company.

At the trial the plaintiff produced and offered in evidence what purported to be a contract between himself and the Rutgers Fire Insurance Company. It was signed on the part of the company by one Kreiser and one Fellows, who were, at the time of its execution, the corporation's secretary and president respectively. The paper also bore the corporate seal of the corporation. The defendant objected to the reception of the paper upon several grounds, and, among others, that it did not appear that the act of the president and secretary was authorized by the board of directors of the insurance company. The objection was sustained and an exception taken, and this exception and others of the same nature present the principal questions to be determined upon this appeal.

The appellant contends that when he had proved that the contract was signed by the president and secretary of the insurance company, and that it bore its corporate seal, this was sufficient

*prima facie* to authorize its admission in evidence. This is undoubtedly the general rule. (Cook Corp. § 722; *Trustees Canandargua Academy v. McKechnie*, 90 N. Y. 618; *New England Iron Co. v. Gilbert El. R. R. Co.*, 91 id. 153; *Jourdan v. L. I. R. R. Co.*, 115 id. 381.) This rule is tersely stated in *Trustees Canandargua Academy v. McKechnie* (*supra*): “‘Where,’” says the court, “‘the common seal of a corporation appears to be affixed to an instrument and the signatures of the proper officers are proved, the courts are to presume that the officers did not exceed their authority and the seal itself is *prima facie* evidence that it was affixed by proper authority.’” But when the contract was first offered, it affirmatively appeared that the seal was affixed, not by authority of the board of directors, but by the authority and at the request of the president of the company, and that after its execution it, or a duplicate, was kept in a safe to which only the secretary and president had access. The general rule referred to, therefore, did not apply. Further proof was required to the effect that the president was authorized by the board of directors to direct that the seal be affixed.

But it seems hardly necessary to pursue this subject further, because if error were committed in thus excluding the contract, the plaintiff was not injured by it. It subsequently appeared from the by-laws, put in evidence by the plaintiff himself, that the secretary and president had no power to make a contract of the character of the one referred to in the complaint; that this power was lodged in the board of directors or a committee consisting of five of its members. That portion of the by-laws which is material to the question provides that the committee of five shall “have referred to them all applications in relation to the establishment of agencies and the employment of agents, and with the concurrence of the board, authorize and establish the same.” The plaintiff was a member of the board of directors at the time the alleged contract was made, and consequently had knowledge of this by-law. Therefore, had the court received the contract in evidence when these facts appeared, it would have been required to strike out the same or else instruct the jury, in the absence of some evidence that the corporation had ratified or adopted the contract, that it was not binding upon it. No evidence whatever was offered to the effect that the corporation

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had authorized the making of the contract, nor was there evidence sufficient to justify a finding that it had ever ratified the act of the president and secretary in making it; in fact, there is nothing to show that its existence was ever communicated to, or that any member of the board of directors, other than the president and secretary and this plaintiff, had knowledge of the same. This being the situation at the close of plaintiff's case, even had the alleged contract been received in evidence, the court could not have done otherwise than have granted defendant's motion to dismiss the complaint.

The judgment appealed from, therefore, must be affirmed, with costs.

VAN BRUNT, P. J., PATTERSON, O'BRIEN and LAUGHLIN, JJ., concurred.

Judgment affirmed, with costs.

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J. HENRY LANE and Others, Appellants, v. HERMAN BOCHLOWITZ,  
Respondent.

*Venus—change of—"party" in the Code of Civil Procedure, § 984, defined—  
convenience of witnesses.*

The word "party," used in section 984 of the Code of Civil Procedure, which provides that certain actions shall be tried in the county in which one of the parties resides, only applies to the parties to the record, and the residence of persons who are not parties to the record, but who are the real parties in interest, cannot be considered.

In determining whether the venue of an action should be changed for the convenience of witnesses, the convenience of the witnesses whose testimony will be material and competent can alone be considered.

APPEAL by the plaintiffs, J. Henry Lane and others, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 30th day of July, 1902, changing the place of trial of the action from the county of New York to the county of Albany.

T. B. Chancellor, for the appellants.

G. Herbert Cone, for the respondent.

McLAUGHLIN, J. :

This action was brought to recover damages for the breach of a contract.

After issue had been joined the defendant moved to change the place of trial from the county of New York to the county of Albany, upon the ground that the latter was the proper county for the trial of the action, and also for the convenience of witnesses. The motion was granted, as appears from the opinion delivered by the learned justice sitting at Special Term, upon the ground that Albany was the proper county, and the plaintiffs have appealed.

The statute provides (Code Civ. Proc. § 984) that an action of this character must be tried in the county in which one of the parties resided at the commencement thereof. An action must be tried in the name of the real party in interest. The statute (§ 446 *et seq.*) so provides, and the sense in which the word "party" is used in the statute, therefore, manifestly refers to a party to the action, who alone must be considered for the purpose of determining the place of trial. This was substantially held in *Seeley v. Clark* (78 N. Y. 220) where the court said: "The words 'party to an action' \* \* \* include parties to the record and no one else. Such is their legal and ordinary meaning. Mead, the person whose examination was directed, it is conceded, is not one of those parties. That he is a party in interest is not sufficient. He is still 'a person not a party.'"

The defendant's contention, which apparently was adopted by the Special Term, seems to have been that there were others not parties to the action who were the real parties in interest, and that considering their residence, the place of trial ought to be changed. In this we think the Special Term erred. Nor do we think it sufficiently appeared to enable the Special Term to adjudicate thereon, that the plaintiffs were not the real parties in interest, even if that fact could have been considered (which it could not) upon the motion to change the place of trial. Therefore, upon this ground the motion should have been denied.

We are also of the opinion that a proper case was not made for a change of the place of trial for the convenience of witnesses. The place of trial of an action may be changed whenever it is made to appear that the convenience of witnesses and the ends of justice will be promoted by the change. (Code Civ. Proc. § 987.) But the

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statute which permits a change for this purpose manifestly refers to witnesses whose testimony will be material and competent upon the trial of the issues involved. The place of trial cannot be changed where the testimony of alleged witnesses would be immaterial or incompetent. Applying this rule to the facts set out in the moving papers, it at once becomes apparent, after even a casual examination of the facts therein stated, that a case was not made which justified an order changing the place of trial. In the amended answer allegations are set forth to the effect that the plaintiffs, at the time the sale of the goods referred to in the complaint was made, were acting as the agents of two corporations—one foreign and the other domestic. One of the reasons assigned for the change of the place of trial was that it would be necessary to prove by the Secretary of the State of New York that the foreign corporation had not complied with the statute so as to entitle it to sue in this State, and also by another witness that such corporation had not complied with the Tax Law so as to entitle it to sue. The corporation referred to is not a party to the action, and if it were, the facts sought to be established by these two witnesses are not a sufficient ground for changing the place of trial, because the court can see that such facts, if established at all, could be by documentary evidence. If it were otherwise, what the defendant desires to prove is of no importance whatever. What the affidavit states in this respect is that such corporation *had not* complied with the General Corporation Law (Laws of 1892, chap. 687, § 15); *had not* complied with the Tax Law (Laws of 1896, chap. 908, § 181). When it is not stated. The time referred to, therefore, may have been long prior to the commencement of the action, and even prior to the sale of the goods referred to in the complaint. There is not a suggestion of a fact contained in the moving papers from which it can be even inferred that this corporation at the time of the sale of the goods alleged, and at the commencement of the action, had not fully complied with the statute so as to enable it to transact business in this State and to maintain an action to enforce any claim which it might have. It is also claimed that the witnesses Mincher and Stone were necessary and material in order to enable the defendant to prove that the plaintiffs were selling yarn manufactured by the Dillon Cotton Mills, a foreign corporation, and that such corporation was doing business

in this State. But if this be conceded, how is it material? There is no statute which prevents, so far as we are aware, the Dillon Cotton Mills selling yarn in the State of New York, or to prevent the plaintiffs selling any goods manufactured by such corporation. It is true it is alleged in the amended answer that plaintiffs were acting as agents of certain corporations, but it is not intimated in the affidavits that the defendants can prove that fact by either of the witnesses referred to. All that is claimed that can be proved by them is that the plaintiffs were selling yarn manufactured by a foreign corporation. As to the witnesses Dabney and Fowler, all that is claimed is that they are freight agents at Cohoes, and know what the freight rates on goods to be shipped would be. It is not difficult for the court to see that these facts could be established by witnesses residing in the city of New York as well as by witnesses residing in the county of Albany.

This leaves only two other witnesses — the defendant himself and his bookkeeper — and it has many times been held that the place of trial will not be changed to suit the convenience of a party to an action, and we do not think it should be changed to suit the convenience of one witness alone.

It follows that the order appealed from, therefore, must be reversed, with ten dollars costs and disbursements, and the motion denied, with ten dollars costs.

VAN BRUNT, P. J., PATTERSON, O'BRIEN and LAUGHLIN, JJ., concurred.

Order reversed, with ten dollars costs and disbursements, and motion denied, with ten dollars costs.

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CHARLES FRANCIS JONES, Respondent, v. GEORGE HARRY LESTER, Appellant.

*Reference — it cannot be ordered until an issue as to the existence of a partnership is first determined.*

Where the complaint, in an action for an accounting, alleges that the parties were copartners and the answer denies the existence of the partnership, an order of reference cannot be granted, under section 1013 of the Code of Civil Procedure, until the issue as to the existence of the partnership has been first determined.

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APPEAL by the defendant, George Harry Lester, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 8th day of August, 1902, appointing a referee to hear and determine the issues raised in the action.

*Edmund W. Powers*, for the appellant.

*Charles W. Lefter*, for the respondent.

McLAUGHLIN, J.:

This action was brought for an accounting. The complaint alleged, among other things, that at a time stated the plaintiff and defendant entered into a partnership agreement for the purpose, among others, of conducting a general brokerage business, and by the terms of which the net profits accruing from the business transacted were to be equally divided between plaintiff and defendant. The answer, among other things, denied the existence of the agreement alleged.

After issue had been joined the plaintiff moved that the issue involved be sent to a referee to hear and determine. The motion was granted and defendant has appealed. The motion should have been denied. The action is in equity and the right to equitable relief depends solely upon the existence of the agreement alleged in the complaint, and this having been denied in the answer, it was the issue to be tried. This issue does not require the examination of a long account, or bring the case within the provisions of the Code (§ 1013) which authorize a compulsory reference. The law seems to be well settled that in an action of this character a reference cannot be ordered until it has first been determined whether the parties are or have been copartners. (*Jordan v. Underhill*, 71 App. Div. 559; *Knox v. Gleason*, 63 id. 99; *Averill v. Emerson*, 74 Hun, 157; *Steck v. Colorado Fuel & Iron Co.*, 142 N. Y. 236.)

The order appealed from, therefore, must be reversed, with ten dollars costs and disbursements, and the motion denied, with ten dollars costs.

VAN BRUNT, P. J., O'BRIEN, INGEGRAHAM and HATCH, JJ., concurred.

Order reversed, with ten dollars costs and disbursements, and motion denied, with ten dollars costs.



## WILLIAM SHEEHAN, Appellant, v. WILLIAM ERBE, Respondent.

*Assignment of a lease by an uneducated client to his legal adviser — in an action by the client to set it aside the burden of showing that no unfair advantage was taken rests on the attorney.*

In an action brought to have an assignment of a lease of certain real estate in the city of New York declared fraudulent and void or to have such assignment declared one in trust for the benefit of the plaintiff's creditors and reformed accordingly, it appeared that the plaintiff, who was a man well advanced in years and barely able to read and write, in 1891 took a lease for a term of ten years, with the privilege of fifteen years' renewal, of certain real estate in the city of New York at an annual rental of \$5,000; that in 1895, after the plaintiff had erected buildings upon the leasehold estate, costing upwards of \$21,000, he obtained a loan from one Ruppert of \$6,000 and gave as security for the payment thereof a mortgage upon his leasehold estate.

At the time the loan was made one Fitch was Ruppert's attorney, and the defendant, who was a lawyer employed in Fitch's office, attended to a considerable part of Ruppert's business, including the loan to the plaintiff. The plaintiff spent the money loaned to him by Ruppert in the erection of new buildings upon the premises, and in December, 1895, the sums invested by him in buildings amounted to over \$30,000. At about this time his unsecured claims amounted to \$2,100 and the holders of such claims were pressing him for payment. He then applied to Ruppert for a further loan sufficient to pay off the claims, but his application was denied. He persisted in renewing such application and frequently advised and consulted with the defendant; gave the latter a list of his creditors together with the amount of their respective claims; informed him as to the details of his property and business and the income therefrom. In April, 1896, he was finally advised, either by the defendant or some one else apparently acting in Ruppert's interest, to make an assignment of his lease to the defendant, and that if he did not do so an action would be instituted to foreclose the Ruppert mortgage. Upon his refusal to make the assignment an action was commenced on the 10th day of April, 1896, to foreclose the Ruppert mortgage.

The plaintiff then applied to the defendant to aid him in effecting a settlement with Ruppert. He was unable to effect such a settlement, and three days after the foreclosure action was instituted the plaintiff delivered to the defendant, for the nominal consideration of one dollar, an absolute assignment of the lease, including the right of renewal. The defendant, however, who drew the lease himself, testified that the actual consideration therefor was an agreement by him to pay off the plaintiff's unsecured claims, satisfy and discharge one-half of the Ruppert mortgage and divide equally with the plaintiff the net rents received. The plaintiff contradicted this testimony and alleged that when the defendant read the lease to him he did not read it according to its terms. Immediately after the execution of the assignment the defendant took

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possession of the leasehold estate, collected the rents and paid one-half to the plaintiff, retaining the other half for himself. The amount which the defendant received from the premises amounted to about \$142.50 a month.

The trial court, while of the opinion that the transaction was suspicious as far as the defendant was concerned, reached the conclusion that this was not enough to warrant the correction of the assignment for fraud or mistake, and dismissed the plaintiff's complaint.

*Held*, that, under the circumstances disclosed by the evidence, it was incumbent upon the defendant to prove that the plaintiff fully understood the contents and effect of the assignment of the lease and to show that the defendant did not take undue and unconscionable advantage of the plaintiff;

That, as the learned trial justice had applied an erroneous rule of law to the facts, the judgment should be reversed and a new trial ordered.

APPEAL by the plaintiff, William Sheehan, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of New York on the 8th day of April, 1902, upon the decision of the court rendered after a trial at the New York Special Term, and also from an order entered in said clerk's office on the 29th day of April, 1902, denying the plaintiff's motion to correct the judgment entered as aforesaid by striking therefrom the words "upon the merits."

*John J. Lenahan*, for the appellant.

*Grant C. Fox*, for the respondent.

McLAUGHLIN, J. :

This action was brought to have an assignment of a lease of certain real estate in the city of New York declared fraudulent and void and canceled of record, or else to have such assignment declared one in trust for the benefit of plaintiff's creditors and reformed accordingly, and to compel defendant to account for the rents received, and for other relief.

The answer admitted the assignment of the lease, but denied the other material allegations of the complaint. It also alleged, as a separate defense, that the plaintiff assigned the lease to the defendant upon his agreeing to advance a sum sufficient to discharge certain judgments and claims which existed against the plaintiff, pay off one-half of a mortgage of \$6,000 on the leasehold estate, and after reimbursing himself for the moneys advanced, equally divide

the net rentals between the parties, and that the defendant had fully performed the agreement upon his part.

The court at Special Term reached the conclusion that upon the facts presented the plaintiff was not entitled to any relief, and directed a dismissal of the complaint. From the judgment entered upon a decision to this effect the plaintiff has appealed.

The action is in equity, and whether or not the court ought to have exercised the power which it possessed in the plaintiff's behalf, depends of course upon the facts established at the trial, and in order to determine whether it erred in refusing to grant the plaintiff any relief, at least a brief examination of such facts is necessary.

The plaintiff is well advanced in years. He possesses very little education, being barely able to read and write. In 1891 he leased, for a term of ten years, with privilege of fifteen years' renewal, certain real estate in the city of New York, for which he agreed to pay an annual rental of \$5,000. Immediately following the execution of the lease he commenced to erect, and in 1895 had succeeded in erecting upon the leasehold estate, buildings which cost upwards of \$21,000. Some time during the year just mentioned he applied to one Ruppert for a loan to enable him to erect additional buildings, and, after considerable negotiations, Ruppert did loan him \$3,000, taking as collateral security for the payment of the same a mortgage upon his leasehold estate. Shortly thereafter Ruppert loaned him the further sum of \$3,000, and a mortgage was then given for \$6,000, presumably to cover both loans, although the first mortgage was not satisfied of record. When these loans were made one Fitch was Ruppert's attorney. The defendant, a lawyer, was employed in Fitch's office, and it seems to have been his duty as such employee to attend to a considerable part of Ruppert's business, looking after chattel mortgages, etc., and in this connection it also appeared that he drew the first mortgage, witnessed plaintiff's signature thereto and took his acknowledgment. The money which plaintiff obtained from Ruppert he expended in new buildings upon the premises covered by the lease, and in December, 1895, had spent for this purpose something over \$11,000, making a total investment by him in buildings of over \$30,000. About this time, or shortly thereafter, he became indebted to various persons for materials used in the construction of his buildings in something like \$2,100, exclusive of the

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Ruppert mortgage. Some or all of these persons were pressing him for payment of their respective claims, some of which had been reduced to judgments, executions issued thereon and returned unsatisfied, and proceedings supplementary to execution instituted. In his embarrassment he applied to Ruppert for a further loan sufficient to pay off these claims. The application was denied. He nevertheless continued, until the early part of April, 1896, to urge Ruppert to help him in his trouble, making frequent visits to his office, where he often met the defendant and consulted and advised with him as to what could be done to relieve him from his financial difficulties. Finally he was advised, according to his testimony, either by the defendant or some one else, apparently acting in Ruppert's interest, that he had better make an assignment of his lease, and when asked to whom it should be made, he was told to the defendant, which statement was coupled with a further one that if he did not do so, an action would be instituted to foreclose the Ruppert mortgage, and on the 10th of April, 1896 — he in the meantime having refused to make an assignment of the lease — an action was brought by Ruppert to foreclose his mortgage, the defendant making the verification to the complaint. Simultaneously with the commencement of that action the plaintiff therein applied for the appointment of a receiver of the interest sought to be foreclosed. As soon as the foreclosure action was commenced the plaintiff placed all of the papers in the hands of the defendant to see if he could not effect a settlement of some kind with Ruppert. It also appeared that about this time plaintiff frequently advised and consulted with the defendant, gave him a list of his creditors, together with the amount of their respective claims, informed him as to the details of his property and business and the income therefrom. Being unable to make any settlement with Ruppert as to the foreclosure action, or to get him to advance any further money, on the thirteenth of April — three days after the foreclosure action was instituted — the plaintiff delivered to the defendant, for the nominal consideration of one dollar, an absolute assignment of the lease, including the right of renewal. The defendant, however, testified at the trial that the actual consideration was an agreement upon his part to pay off the claims which existed against the plaintiff at the time the assignment was made, satisfy and discharge one-half of the Ruppert mortgage,

and to divide equally with the plaintiff the net rents received. This was contradicted by the plaintiff. The defendant drew the assignment himself and, according to plaintiff's testimony, then handed it to him to read, which, being unable to do, the defendant read it to him, but not according to its terms. Immediately following the execution of the assignment the defendant took possession of the leasehold estate, collected the rents and paid therefrom one-half to the plaintiff, retaining the other half for himself, except as to the rent of a saloon, of which it seems the plaintiff had the whole. According to the defendant's own testimony, from the 1st of April, 1895, until the 1st of January, 1902, he collected \$53,151.42; of this sum he paid the ground rent, \$28,749.94; to the plaintiff, \$15,069.77, and retained for himself \$9,310.04; and that if the present rental, \$9,425 per year, continued for the next fifteen years, he would receive the same as he was getting at the time of the trial, viz., \$142.50 per month.

The trial court, while of the opinion that the transactions were suspicious, so far as the defendant was concerned, reached the conclusion that this was not enough to warrant the correction of the assignment for fraud or mistake; that, to justify that, the testimony must be "clear, unequivocal and convincing." The learned justice seems to have overlooked the fact that there was here a confidential relation existing between the parties, and that in addition thereto they did not deal upon a plane of equality by reason of the strength and superior knowledge of one, and the weakness and confidence and dependence justifiably reposed of the other, and that the rule referred to, therefore, had no application whatever. On the contrary, the rule to be applied was that, there being suspicious circumstances by reason of the facts stated, the burden was put upon the defendant of showing that the transaction was a fair one, and that no undue advantage of the plaintiff was taken by him. (*Green v. Roworth*, 113 N. Y. 462; *Fisher v. Bishop*, 108 id. 25; *Cowee v. Cornell*, 75 id. 99; *Rosevear v. Sullivan*, 47 App. Div. 421.) Every contract must be fair — that is, it must be free from deceit, fraud or misrepresentation practiced by one of the contracting parties upon the other, and whenever a court of equity can see that undue and unconscionable advantage has been taken by one of the parties, by reason of a confidential relation existing between them at the time

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the contract was made, or that they did not then deal upon a plane of equality by reason of the facts stated, it never hesitates to exercise its equitable powers to enforce a right or to prevent the consummation of a wrong.

That there were suspicious circumstances sufficient to cast upon the defendant, under the rule above alluded to, the burden of proving that the plaintiff fully understood the contents and effect of the assignment, and that defendant did not take undue and unconscionable advantage of him, cannot, we think, be seriously questioned and especially in view of the relations which existed between them, to say nothing of the pecuniary value of the contract which the defendant obtained, or that the assignment of the lease, absolute upon its face, was not in fact what it really purported to be, and that the agreement between the parties was not correctly expressed therein.

The trial proceeded upon a wrong theory, the learned justice sitting at Special Term applied a wrong rule of law to the facts, and for these reasons the judgment appealed from must be reversed and a new trial ordered, with costs to the appellant to abide the event.

VAN BRUNT, P. J., O'BRIEN, INGRAHAM and HATCH, JJ., concurred.

Judgment reversed, new trial ordered, costs to appellant to abide event.

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THE PEOPLE OF THE STATE OF NEW YORK ex rel. CHARLES L. COOKE, Appellant, v. PEREZ M. STEWART, Superintendent of Buildings for the Borough of Manhattan in the City of New York, Respondent.

*Mandamus to compel a superintendent of buildings to enforce the building law—the owners of buildings to be affected thereby are necessary parties—review by the courts of the superintendent's approval of materials used.*

A writ of mandamus to compel the superintendent of buildings of the borough of Manhattan to take such action as may be necessary to prevent an alleged violation of section 105 of the Building Code, in the construction of three new buildings, which have at the time been substantially completed or are in the process of construction, will not be issued where it appears that the action

which it is asked that the superintendent of buildings be compelled to take will involve the destruction of the buildings to a greater or less extent, and that the owners of the buildings have not been made parties to the proceedings.

*Quare*, whether, if it appears that the superintendent of buildings approved of the materials used in the construction of the buildings in question, his action in the premises can be reviewed by the court, and also whether, if his action is reviewable by the court, a citizen and resident of the borough in which the buildings are erected may institute the proceeding to review the superintendent's action.

APPEAL by the relator, Charles L. Cooke, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 25th day of September, 1902, denying the relator's motion for an alternative writ of mandamus.

*Austin E. Pressinger*, for the appellant.

*Matthew C. Fleming*, for the respondent.

McLAUGHLIN, J. :

The relator, a resident and citizen in the borough of Manhattan in the city of New York, applied to the court for an alternative writ of mandamus to compel the defendant, as the superintendent of buildings of such borough, to enforce the provisions of section 105 of the Building Code, and take such action as might be necessary to prevent the violation thereof in the construction of three buildings specified, which were the St. Regis Hotel, the Hanover National Bank building and the Lord's Court building, which were at the time the petition was made new buildings which had then been substantially completed, or were in the process of construction.

The section of the Building Code referred to provides that when the height of a fireproof building exceeds twelve stories, or more than 150 feet, the floor surfaces shall be of stone, cement, rock asphalt, tiling or similar incombustible material; that the sleepers and floors may be of wood treated by some process approved by the board of buildings (the powers and duties of the board of buildings have been conferred upon the superintendent of buildings by section 408 of the revised charter of the city of New York, Laws of 1901, chap. 466) so as to render the same fireproof; that all outside window frames shall be of metal or wood covered with metal; that

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the inside window frames, doors, trim and other interior finish may be of wood, either covered with metal or else treated by some process which will render the same fireproof: and that all the partitions shall be of fireproof material.

The petition for the writ alleged, in substance, that prior to the commencement of the proceeding, the owners of the buildings referred to, who were not named or made parties to the proceeding, were respectively engaged in the erection of the buildings stated, each of which came within the provisions of the ordinance, in that they were more than 150 feet in height; that such owners had not complied with the requirements of section 105 of the Building Code, in that "wood has been and is being used in the construction of bucks, studding and partitions, which has not been treated by some process to render the same fireproof; \* \* \* (that) sleepers have been and are being used in the construction thereof which have not been treated by some process to render the same fireproof;" and that the respondent had due notice of these facts, notwithstanding which he had neglected and failed to discharge his duty in the premises.

The return to the writ denied the material allegations of the petition and especially the allegations to the effect that the construction of the buildings failed to comply with the provisions of the Building Code, and set forth facts which, if true, constituted a perfect defense to the motion.

The motion was denied, and from that order the relator has appealed. The buildings referred to, as already stated, either were or had been substantially completed, and to have compelled the superintendent of buildings to do what the relator asked, would work a material injury to, if not a substantial destruction of, the buildings themselves. It would certainly destroy property to a greater or less extent, and property cannot be destroyed, so far as I am aware, under any recognized rule of law, unless its owner has first been heard upon that subject. Here, as already said, the owners of the buildings were not made parties to the proceedings. What their answer would be to the charge that they had violated the Building Code in using materials in the construction of their respective buildings, we are unable to say, and the court ought not to interfere with their property rights by ordering the superintendent



of buildings to remove any part of the materials used until the owners have first been heard. They are entitled to their day in court. (*People ex rel. Francis v. Common Council*, 78 N. Y. 33 ; *Matter of Hilton Bridge Construction Co.*, 13 App. Div. 24 ; *People ex rel. Ballou v. Wendell*, 57 Hun, 362.)

It has been suggested, and it seems to have been the view entertained by the justice sitting at Special Term, that the action of the superintendent of buildings cannot be reviewed by the court, inasmuch as it appears from the return that he approved of the materials used and that his act was a judicial one. I am unwilling to place my affirmance of this order upon that ground. The superintendent of buildings is a public officer, and if he refused to act at all, or acted in such a way that the court could see that there was no justification for his act, I think his action could be reviewed and that he could be compelled, in the one instance, to act, and in the other, to refrain from acting. It is, however, unnecessary for the court at this time to pass upon this question, inasmuch as its determination is not necessarily involved in the disposition to be made of the appeal. It is also suggested that the relator does not show that he has sufficient interest in the subject-matter of the proceeding to enable him to maintain it, but in view of the conclusion at which we have arrived, it is also unnecessary to pass upon this question. It is proper, however, to state that it does appear that the relator is a citizen and resident of the borough of Manhattan in the city of New York, where the violations of the ordinance are alleged to have, and now are, taking place, and this would seem to be sufficient to enable him to maintain a proceeding to compel a public official to perform his duty. (*People ex rel. Waller v. Supervisors of Sullivan Co.*, 56 N. Y. 249 ; *People ex rel. Kelly v. Common Council*, 77 id. 511 ; *People ex rel. Platt v. Rice*, 144 id. 249.)

Upon the ground, therefore, that the owners of the buildings were not made parties to the action, I am in favor of an affirmance of this order, without considering or passing upon the other questions raised.

The order appealed from, therefore, must be affirmed, with ten dollars costs and disbursements.

O'BRIEN, J., concurred ; LAUGHLIN, J., concurred in result.

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VAN BRUNT, P. J. (concurring):

I concur in the result. I am also of the opinion that the plaintiff in this case has no standing in court. He is simply a resident and citizen of the borough of Manhattan in the city of New York and has no greater interest in the subject-matter of this application than any other citizen of said city. It has been repeatedly held that departments cannot be set in motion upon the application of mere citizens who have no special interest in the subject-matter.

PATTERSON, J., concurred.

Order affirmed, with ten dollars costs and disbursements.

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THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. JOHN M. SWASEY, Appellant.

*Abduction — what evidence is not corroborative.*

Upon the trial of an indictment charging the defendant with the crime of abduction, under subdivision 1 of section 263 of the Penal Code, the complainant and a companion gave testimony which, if credited, established that the defendant committed the crime while the complainant and her companion were in his rooms on Sunday morning, April 27, 1892. The People, for the purpose of corroborating the testimony of the complainant, produced a physician, who testified that he examined the person of the complainant, and that, as a result of such examination, he was able to say that she had had sexual intercourse previous thereto, but that he was unable to state whether it was prior or subsequent to April 27, 1892. No evidence was given as to the whereabouts of the complainant during the interval between April 27, 1892, and the examination, and she testified that she had led an immoral life for several years prior to April 27, 1892.

*Held*, that the testimony of the physician did not corroborate that of the complainant in the slightest degree, and that it was error for the court to receive such testimony.

The complainant further testified, and was corroborated in some respects by her companion, that after the commission of the crime the defendant went with the complainant and her companion to a dry goods store and there made certain purchases for them. To corroborate this testimony, the People produced a saleswoman employed in the store, and she testified that upon a Sunday morning — she was unable to state the month or day of the month — two girls came to the store with a young man, who purchased certain articles for them, and that she recognized complainant's companion as one of the girls. She did not

identify the defendant as the man who accompanied the girls, nor did she describe such man.

*Held*, that the evidence of the saleswoman was not corroborative of the testimony of the complainant or her companion, and that it was error for the court to refuse to strike it out.

Corroborative evidence, whether consisting of acts or admissions, must be of such a character as tends to prove to some extent the guilt of the accused by connecting him with the crime charged in the indictment.

APPEAL by the defendant, John M. Swasey, from a judgment of the Court of General Sessions of the Peace in and for the city and county of New York in favor of the plaintiff, entered on the 9th day of July, 1902, convicting the defendant of the crime of abduction, and also from an order entered on the 9th day of July, 1902, denying the defendant's motion for a new trial.

*Charles E. Le Barbier*, for the appellant.

*Robert C. Taylor*, for the respondent.

McLAUGHLIN, J. :

The indictment charged the defendant with having committed three crimes : (1) Rape in the second degree ; (2) assault with intent to rape ; and (3) abduction, under subdivision 1 of section 282 of the Penal Code.

At the trial, at the conclusion of the People's case, upon motion of defendant's counsel, the district attorney was required to elect upon which count in the indictment he would ask for a conviction. He did so and stated that he would go to the jury upon the third count, abduction. The trial proceeded and the defendant was found guilty of that crime, for which he was sentenced to imprisonment for a term of not less than four years nor more than four years and five months. He has appealed from the judgment of conviction and from an order denying a motion for a new trial and in arrest of judgment.

We are of the opinion that the judgment appealed from should be reversed, and having reached that conclusion it is unnecessary to state in detail the facts, many of which are revolting in their nature, further than to point out the errors committed, which require a new trial.

The third count in the indictment, under which the defendant

was convicted, charged that he, on the 27th day of April, 1892, received, harbored and employed, for the purpose of sexual intercourse, one Florence Killeen, she at the time being under eighteen years of age. Upon the trial it appeared, from the testimony on the part of the People, that the defendant occupied in connection with one Edwards, certain rooms in a building in the city of New York; that on the evening of the 26th of April, 1892, the complaining witness, Florence Killeen, then under eighteen years of age, and two other girls of about the same age as herself, went to the defendant's rooms and remained there until half-past ten o'clock, when they left, but it is not claimed that anything occurred at this time which justified a conviction; that between twelve and one o'clock of the following morning the complainant and one of her companions returned to the defendant's rooms, asked to be and were admitted, and remained there several hours. It is unnecessary to state what there took place if the testimony of the complainant and her companion is to be believed, further than it is sufficient to justify the jury in convicting the defendant of the crime charged.

The defendant admitted that the girls were in his rooms on the evening of the twenty-sixth, but denied that any of them returned to or were in his rooms on the twenty-seventh. The character of the complainant and the companion who it is claimed returned with her to the defendant's rooms on the morning of the twenty-seventh, as developed upon their cross-examination, was bad, and to such a degree that the same might properly be considered as bearing upon the credibility of the testimony given by them, and especially so when considered in connection with the testimony of the defendant, whose character prior to the charge here made against him appeared to have been uniformly good.

The learned district attorney, appreciating that a conviction could not be had upon the uncorroborated testimony of the complainant (Penal Code, § 283), sought to establish such corroboration in several ways. *First*. He produced a physician who was permitted to testify, against defendant's objection and exception, that twelve days after the offense was alleged to have been committed he examined the person of the complaining witness, and, as a result of that examination, was able to state that she had previously thereto had sexual intercourse, but he was unable to state when that had taken

place ; that it might have been prior to the 27th of April, 1892, and it might have been intermediate that date and the time of the examination. No evidence whatever was given as to where the complainant had been, or what her conduct was during that time, and she herself testified that for several years prior to the twenty-seventh of April she had led an immoral life, and had prior thereto several times had sexual intercourse. These facts appearing, the testimony of the physician did not corroborate the testimony of the complainant in the slightest degree, or tend to show that the defendant was guilty of the crime charged against him. The court, therefore, erred, *first*, in receiving this testimony, and, *second*, in not striking it out on defendant's motion, and it cannot be assumed on this appeal that it did not injure the defendant. (*People v. Wood*, 126 N. Y. 249 ; *Brauer v. City of New York*, 74 App. Div. 212.)

*Second.* The complainant testified, and she was corroborated in some respects by her companion, Annie Blood, that after remaining in the defendant's rooms several hours on the morning of the twenty-seventh of April, the defendant went with them to a dry goods store, and there purchased for them certain articles of wearing apparel. This the defendant denied, and to establish that their statements were true the learned district attorney called a saleswoman employed in the store where it was claimed the goods were bought. The saleswoman testified that upon a Sunday morning — what month or day of the month she could not positively state — two girls came to the store with a young man, who purchased a waist and a pair of stockings, and that she recognized Annie Blood as one of the girls. She did not identify the defendant as the man who came into the store with the two girls, or made the purchases ; she did not describe the man who did come, and there was nothing in her testimony from which the jury could even infer that it was the defendant.

The defendant moved that the testimony of this witness be stricken out. The motion was denied and an exception taken. We think this motion should have been granted. The testimony of the saleswoman did not connect the defendant with the commission of the crime charged, nor did it tend to corroborate in any degree whatever the testimony of the complaining witness, or her companion, Annie Blood. The fact that they went to the store and

made purchases, in company with a man, did not corroborate their statement that that man was the defendant. If it did, then it is not difficult to see how easy it would be for a witness to manufacture evidence which would corroborate statements thereafter made. Corroborative evidence, whether consisting of acts or admissions, must be of such a character as tends to prove to some extent the guilt of the accused by connecting him with the crime charged in the indictment. (*People v. O'Sullivan*, 104 N. Y. 481; *People v. Kearney*, 110 id. 188; *People v. Page*, 162 id. 272.) This testimony did not do that, and for that reason, as already said, defendant's motion to strike it out should have been granted. Upon a careful consideration of the whole case, therefore, we are of the opinion that justice demands that there shall be a new trial.

The judgment appealed from should be reversed and a new trial ordered.

VAN BRUNT, P. J., PATTERSON, O'BRIEN and LAUGHLIN, JJ., concurred.

Judgment reversed, new trial ordered.

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THE PEOPLE OF THE STATE OF NEW YORK ex rel. THE DIVES-PELICAN MINING COMPANY, Appellant, v. THOMAS L. FEITNER and Others, Commissioners of Taxes and Assessments of the City of New York, Respondents.

*Tax—what is not "doing business" in the State of New York.*

A corporation organized under the laws of the State of Colorado and having its principal place of business in that State, was authorized to do business in the State of New York and had an office in the city of New York. The New York office was maintained for the sole purpose of enabling the directors of the corporation to meet in it and declare dividends upon its stock. No goods of the corporation were sent to or sold in New York, and it had no bills receivable in New York, and the only assets which it had in that State were its office furniture and money on hand and in bank which had been sent from its principal office to its New York office for the purpose of paying dividends.

*Held*, that the corporation was not "doing business" in the State of New York within the meaning of section 7 of the Tax Law (Laws of 1896, chap. 906).

APPEAL by the relator, The Dives-Pelican Mining Company, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 25th day of July, 1902, dismissing a writ of certiorari to review an assessment upon personal property for the purposes of taxation, and also from a judgment in favor of the defendants entered in the office of the clerk of the county of New York on the 5th day of August, 1902, pursuant to said order.

*Robert L. Harrison*, for the appellant.

*David Rumsey*, for the respondents.

McLAUGHLIN, J. :

The relator is a foreign corporation organized under the laws of the State of Colorado and has its principal place of business at Georgetown in that State. It also has an office in the city of New York and has been authorized to do business in the State of New York.

During the year 1901 it was assessed by the commissioners of taxes and assessments in the city of New York for the purposes of taxation for that year on certain personal property, and during the time within which correction of the assessment could be made it appeared before the taxing officers and asked that the assessment be stricken from the roll, and in connection with its request filed a verified statement showing what property it had in the State of New York. From this statement it appeared that its entire assets in the State of New York consisted of a safe, office furniture and fixtures of the value of \$150 and cash on hand and in bank, amounting to \$3,364.86. The commissioners of taxes and assessments held that this property was taxable in the State of New York and assessed it at \$3,500. The relator thereupon procured a writ of certiorari to review the assessment, and the matter coming on to be heard before the Special Term the writ was dismissed, and from that order the present appeal is taken.

There is no dispute as to the facts. The sole question presented is whether or not the property of the relator comes within section 7, chapter 908 of the Laws of 1896, so as to make it liable for taxation in this State. This section provides: " § 7. When property of

nonresidents is taxable.—Nonresidents of the State doing business in the State, either as principals or partners, shall be taxed on the capital invested in such business as personal property at the place where such business is carried on to the same extent as if they were residents of the State.” But this corporation was not doing business in the State of New York in the sense in which that term is used in the statute. The fact that it had an office here and was authorized to do business did not make it “doing business.” The office which it had here was used simply for the purpose of enabling the directors to meet in it and declare dividends upon its preferred stock, and the cash on hand and money in bank was for the purpose of paying such dividends when declared. This is all the business it did in the State of New York, and this clearly did not bring it within the statute making it liable to taxation.

The case is much like *People ex rel. Sherwin Co. v. Barker* (5 App. Div. 246; S. C. affd., 149 N. Y. 623). There it was held that a foreign corporation which had its principal office and manufactory in Cleveland, Ohio, and sent its manufactured goods to a salesroom in New York for sale, the proceeds of which, except a small amount for rent, etc., were sent to Cleveland, was not liable to assessment for the amount of goods usually kept on hand.

Here no goods were sent to New York; no sales were made in New York, and it had no bills receivable in New York. Can it be said, simply because a foreign corporation has an office in the State of New York, in which directors meet for the purpose of declaring dividends, and then has money sent from its principal office to New York with which to pay those dividends, that that makes it liable to taxation? Manifestly not.

The order appealed from must be reversed, with ten dollars costs and disbursements, and the assessment stricken from the roll, with fifty dollars costs.

VAN BRUNT, P. J., PATTERSON, O'BRIEN and LAUGHLIN, JJ., concurred.

Order reversed, with ten dollars costs and disbursements, and assessment stricken from the rolls, with fifty dollars costs.



WILLIAM G. BARSON and CHARLES H. BARSON, Respondents, v.  
AGNES K. MURPHY MULLIGAN and WILLIAM G. MULLIGAN,  
Appellants.

*Trial — proof proper on the direct case is admissible in rebuttal only in the discretion of the court — an issue as to the ownership of a mortgage does not admit of proof that an assignment by the alleged owner was only as collateral to a debt since paid.*

The heirs at law of one Selena Barson, who had died intestate seized of certain real estate, brought an action in ejectment against Agnes K. Mulligan and William G. Mulligan, husband and wife, who were in possession of the premises. The answer alleged that Mrs. Mulligan was, prior to October 1, 1897, and at all times thereafter had been, the owner and holder by certain mesne assignments of a mortgage upon the premises executed by Selena Barson October 1, 1858. Upon the trial the defendants proved the execution of the mortgage; that the defendant Agnes K. Mulligan had, by mesne assignments, acquired the same on June 28, 1888, and then rested.

The plaintiffs then proved in rebuttal that on July 6, 1888, the defendant Agnes K. Mulligan assigned the mortgage to one Steers and rested.

The defendants then attempted to prove by parol evidence that the assignment to Steers, while absolute in form, was really given as collateral security for the payment of a loan; that the loan had been paid and the mortgage formally reassigned to the defendant Agnes K. Mulligan.

*Held*, that the refusal of the court to allow the defendants to prove such facts was not erroneous for the following reasons: *First*, that under the terms of the answer the defendants were not entitled to prove by parol evidence that an assignment, absolute upon its face, was in fact only given as collateral security for the payment of a loan; *second*, because at the time such evidence was offered it was discretionary with the court whether or not to receive it.

Upon a trial a party is bound to produce all his evidence before he closes his side of the case, and after he has closed his case and rested, it is within the discretion of the court whether or not to allow a reopening of the case to supply omissions or to receive further testimony.

APPEAL by the defendants, Agnes K. Murphy Mulligan and another, from a judgment of the Supreme Court in favor of the plaintiffs, entered in the office of the clerk of the county of New York on the 28th day of March, 1902, upon the verdict of a jury, and also from an order entered in said clerk's office on the 7th day of April, 1902, denying the defendants' motion for a new trial made upon the minutes, with notice of an intention to bring up for review upon such appeal an order made at the New York Trial Term and entered in the office of the clerk of the county of New York on the

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27th day of March, 1902, granting the plaintiffs' motion to double the damages as assessed by the jury from September 8, 1898, to March 8, 1902.

*Brainard Tolles*, for the appellants.

*Henry A. Forster*, for the respondents.

McLAUGHLIN, J. :

This action was in ejectment. At the conclusion of the trial the court directed a verdict for the plaintiffs upon the issues involved, except as to the damages claimed, which question was submitted to the jury, and it having reported in favor of the plaintiffs in a specified sum, which was doubled by the court, judgment was entered from which defendants have appealed.

There have been two trials of the action. On the former, plaintiffs had a judgment which, on appeal to this court, was reversed and a new trial ordered. (*Barson v. Mulligan*, 66 App. Div. 486.) The facts established upon the second trial, so far as the same relate to plaintiffs' title, are substantially the same as those established upon the first trial. They are fully stated in the opinions delivered upon the former appeal, and, therefore, it is unnecessary to restate them here. It is sufficient to say that such facts established title in the plaintiffs, and by reason thereof, the right to the possession, unless such right were defeated by the defense relied upon, which was substantially to the effect that the defendant Agnes K. Mulligan, prior to the 1st of October, 1897, was, and at all times thereafter had been, the owner and holder of a mortgage on the premises in question, given by Selena Barson on the 1st of October, 1853.

Upon the trial the defendants proved the giving of the mortgage by Selena Barson; that the defendant Agnes K. Mulligan, by mesne assignments, acquired the same on the 28th of June, 1888, and then rested. The plaintiffs then proved in rebuttal that on the 6th of July, 1888, the defendant Mulligan assigned the mortgage to one Steers, and rested. The defendants then attempted to prove by parol evidence that the assignment to Steers, while absolute in form, was really given as collateral security for the payment of a loan made by a bank of which Steers was president to the defend-

ant Agnes K. Mulligan; that the loan was, in fact, paid prior to the death of the life tenant, and the mortgage formally reassigned to the defendant Mulligan on the 6th of October, 1897, four days after the death of the life tenant. This proof was objected to, the objection sustained and exceptions taken, and these exceptions present the principal questions to be decided upon this appeal.

We are of the opinion that the exceptions are not well taken.

*First.* The proof was not within the issue. The answer alleged that Mrs. Mulligan was prior to the 1st of October, 1897, and at all times thereafter had been, the owner and holder, by certain mesne assignments, of the mortgage referred to. She could not, under this allegation, prove by parol evidence that an assignment absolute upon its face was, in fact, only given as collateral security for the payment of a loan. (*Mutual Life Ins. Co. v. Robinson*, 24 App. Div. 570.) No such issue was presented by the pleadings and it was one which the plaintiffs could not anticipate would be raised, and one which they ought not to have been compelled to try. The purpose of pleadings is to notify parties in advance of the trial of the issues to be tried in order that they may properly prepare for the trial.

*Second.* It cannot be said that the court erred in excluding the evidence, because at the time it was offered it was discretionary with the court whether or not it would receive it. Upon a trial a party is bound to produce all his evidence before he closes his side of the case, and after he has closed his case and rested it is within the discretion of the court whether or not to allow a reopening of the case to supply omissions or to receive further testimony, but such discretion should be sparingly exercised. (*Marshall v. Davies*, 78 N. Y. 414; *Agate v. Morrison*, 84 id. 672; *Young v. Johnson*, 123 id. 226.) In *Marshall v. Davies* (*supra*) the court said: "No rule for the conduct of trials is more familiar than that the party holding the affirmative is bound to introduce all the evidence on his side before he closes. (*Hastings v. Palmer*, 20 Wend. 225.) He must exhaust all his testimony in support of the issue on his side before the testimony on the opposite side has been heard. \* \* \* He can afterwards introduce evidence in rebuttal only. Rebutting evidence in such cases means, not merely evidence which contradicts the witnesses on the opposite side and corroborates those of the party who began, but evidence in denial of some affirmative fact

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which the answering party has endeavored to prove." Here, the defendants, if they desired to prove that the mortgage, after it was acquired by the defendant Mulligan, was assigned to Steers only as collateral security for the payment of a loan, and that the loan was paid prior to the death of the life tenant, and that a formal reassignment was made after his death, should have offered such proof before they rested. They could not gamble upon the chance that the plaintiffs did not know that the mortgage had been assigned to Steers, and if they had acquired such information, then offer further proof in explanation of it. This rule is fairly stated in the head note of *Fox v. Matthiessen* (84 Hun, 396; S. C. affd., 156 N. Y. 691): "The plaintiff in an action has no right to withhold a part of his testimony until he has ascertained how far the defendant's testimony would contradict the same, and then offer the balance of his testimony in rebuttal. It is discretionary with the trial court how far it will permit the reopening of a case on rebuttal, and its ruling in that respect is not reviewable upon appeal." It is also urged that a question of fact was presented as to the death, intestate and without issue, of George Barson. The complaint alleges the existence of such facts, and we do not find that the same are anywhere denied in defendant's answer. There being no denial of them, they were admitted. Other questions are raised by the appellants, but they do not seem to be of sufficient importance for consideration.

We are of the opinion that the judgment and order should be affirmed, with costs.

VAN BRUNT, P. J., O'BRIEN, INGRAHAM and HATCH, JJ., concurred.

Judgment and order affirmed, with costs.

LOREN E. HUNTLEY, Respondent, v. PROVIDENCE WASHINGTON  
INSURANCE COMPANY, Appellant.

*Marine insurance — when a “vessel is not lying between piers.”*

A clause in a policy of marine insurance exempting the insurance company from liability for damages occasioned by ice, “except when the vessel is lying between piers,” is designed to relieve the company from liability for damages thus occasioned except when the vessel is lying between two piers so contiguous to each other as to furnish shelter to both sides of the vessel; and if the vessel be injured by ice while lying at the south side of a pier, when the next pier southerly is nearly a half mile away, the insurance company is not liable for such injuries.

APPEAL by the defendant, the Providence Washington Insurance Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 6th day of March, 1902, upon the verdict of a jury, and also from an order entered in said clerk’s office on the 17th day of March, 1902, denying the defendant’s motion for a new trial made upon the minutes.

*La Roy S. Gove*, for the appellant.

*James K. Symmers*, for the respondent.

HATCH, J. :

This action is brought to recover upon a marine policy of insurance, issued by the defendant upon the steam canal boat *W. E. Witter* against loss by reason of marine peril. The policy was issued on the 1st day of September, 1898. By its terms it provided that the vessel should be securely moored in a place satisfactory to the company between noon on the tenth day of September and noon on the first day of April following the issuance of the policy, the company to be notified as to the time when and the place where it was to be laid up. There was some modification of this policy, as was conceded upon the argument, whereby the boat was authorized to be navigated during the prohibitory season, but no liability was to attach to the defendant company for any damage inflicted by ice when being so navigated. The liability of the company in this regard was concededly limited to a case “from damage in conse-

quence of ice, except when the vessel is lying between piers." The proof disclosed that the boat was navigated to the pier of the General Chemical Works, located at Shady Side on the New Jersey shore of the North river, where she was engaged in receiving cargo. She remained at the end of the pier while the tide was at flood. When the tide began to ebb the plaintiff loosened the boat and swung her around to the south side of the pier, and while lying in this position in the early morning she was struck by a cake of ice upon the port side, receiving injuries from which she sank. The only question to be determined is, was the boat, at the time when she was struck by the ice, located in a place where liability for injuries therefrom would attach, or, in other words, did the place where the boat was lying bring her within the excepted clause of the policy, so that liability attached for damage occasioned by ice?

It was undisputed that the first pier south of the chemical works' pier, where the boat was lying, was distant by actual measurement 2,200 feet. Between these points there were two projections from the shore into the river, but it was not claimed that these projections constituted piers within the meaning of the policy. A case was, therefore, presented where the court was called upon to determine whether a boat lying between piers so situated is within the exception contained in this policy. There is no proof in the case showing, or tending to show, any practical construction of the language of the policy in this respect either by custom or otherwise. The question presented, therefore, became one of law for determination by the court and not by the jury, as a case was not presented where conflicting inferences could be drawn from the proofs submitted.

If, however, the interpretation of the contract by the jury was the proper one, the defendant could not complain, as the result would be the same had the court construed it in like manner; consequently, it would not be aggrieved by the judgment entered thereon. By the terms of the policy the defendant did not assume liability for damage inflicted by ice when the boat was being navigated. What it sought to secure was a reasonably safe place for the boat when it should be laid up, and its liability was conditioned thereon. By the terms of the policy the boat was authorized to be navigated between Philadelphia, Baltimore and New York. If she

lay at any time at one side of a pier between these points in a sense, and as a physical fact she would be lying between piers, even though they were miles apart. In the present case the boat was lying between piers which were separated by nearly half a mile. If the policy be construed as contemplating piers situated long distances apart, then it would necessarily follow that the boat might lie midway between such spaces, although at the time when so fastened or anchored she would be as liable to injury from ice as though there were no piers on either side. Such a construction of the clause in question would furnish no protection to the insurer whatever, and the exception which it made would be absurd and meaningless. It is manifest that such construction cannot obtain, as its effect would be to furnish no exemption at all from liability on account of ice, and evidently these parties did not contemplate that such were the terms of the contract. By a reasonable construction of the clause in question it seems to have been intended that when the boat was tied up it should be so situated as to receive shelter from piers upon either side. The physical condition required that the boat should be protected upon one side as well as the other, for as the tide flowed and ebbed the boat would be subject to peril from one side or the other, and when the tide flowed or ebbed upon the exposed side of the boat a pier situated 2,200 feet away would furnish no protection whatever from such danger, and if anchored midway between piers miles apart no shelter to either side would be obtained. The primary purpose was to secure shelter for the boat when liability attached. Manifestly such a condition was within reasonable contemplation, and in order to secure it, it would be necessary that the piers be so contiguous to each other as to furnish such shelter to both sides of the boat. It is probably true that the distance which might separate the piers and still furnish shelter would be somewhat elastic and be determined by existing conditions. A case may arise where a question of fact would be presented as to whether the piers between which the boat laid were within the contemplation of the policy, and reasonably furnished the protection for which the contract stipulated. Piers, however, so situated as to be useless in protection of the boat are in no sense within the terms of this policy. In the present case there was no protection whatever against floating ice from the pier to the south of where

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the boat laid. Consequently, at the time she received the injury, she was not within the exception contained in the policy, and, therefore, no liability attached thereunder for the injury which she received.

It follows from these views that the judgment and order should be reversed and a new trial granted, with costs to the appellant to abide the event.

VAN BRUNT, P. J., O'BRIEN, INGRAHAM and McLAUGHLIN, JJ., concurred.

Judgment and order reversed, new trial ordered, costs to appellant to abide event.

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ROSALIE M. STEELE and Others, Respondents, v. R. M. GILMOUR MANUFACTURING COMPANY, Appellant.

*Attachment — sufficiency of an affidavit of an agent — allegation as to no counterclaims — basis of statement that defendant is a foreign corporation.*

Where the affidavit used on a motion to obtain a warrant of attachment is made by an agent of the plaintiff who has personal knowledge of the entire transaction, a statement contained in such affidavit that "there are no counterclaims, discounts or set-offs existing in favor of the defendant, except as above stated, to his knowledge," is a sufficient compliance with that provision of section 636 of the Code of Civil Procedure which requires the affidavit to show that the plaintiff is entitled to recover the sum stated therein "over and above all counterclaims known" to plaintiff.

What evidence that the defendant is a foreign corporation, based upon information to that effect derived from private publications called the "Partnership and Corporation Directory" and the "Directory of Foreign Corporations," and upon a telegram from the Secretary of State of the state in which the corporation is alleged to be incorporated, is sufficient to support the attachment, considered.

VAN BRUNT, P. J., dissented.

APPEAL by the defendant, the R. M. Gilmour Manufacturing Company, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 22d day of October, 1902, denying the defendant's motion to vacate a warrant of attachment theretofore issued in the action.



*P. Q. Eckerson*, for the appellant.

*George W. Wickersham*, for the respondents.

HATCH, J. :

This action was brought to recover a balance claimed to be due for the rent of certain premises. The attachment procured therein was based upon the affidavits of the agent of the plaintiffs and upon the complaint in the action, verified by such agent. The affidavit sets forth that deponent is the agent of the plaintiffs and has had entire charge for ten years last past of the collection of all rents of property owned by the plaintiffs in the State of New York, and that he is entirely familiar with their financial circumstances; that a cause of action exists in favor of the plaintiffs against the defendant to recover a sum of money, to wit, \$858.36 as damages for a breach of contract other than a contract of marriage; that the plaintiffs herein let and rented to the defendant, on the 13th day of February, 1894, the premises known as 84 John street in the city of New York; that the defendant went into possession under the lease and continued therein until May 1, 1902; that after the expiration of the same the defendant continued in possession of said premises and thereby elected to continue his tenancy thereof for another year from May 1, 1902, upon the terms and conditions provided by the last renewal of the lease; that by its terms the annual rental is the sum of \$2,300 per year, payable in equal monthly installments in advance; that the defendant has not paid the rent for the months of March to October, inclusive, amounting in the aggregate to \$1,533.36, except the sum of \$675 received from various insurance companies for a period during which said premises were uninhabitable, leaving the sum of \$858.36 due and owing from the defendant to the plaintiffs on the last day of October, 1902; that the said sum has been demanded of the defendant and payment thereof refused.

The knowledge of the agent is stated in the following language: "Deponent's knowledge as to the matters aforesaid is derived from having entered into the agreement with the said defendant for the lease of said premises, and from having made the various renewals thereof, and from conversations had with R. M. Gilmour, the president of the defendant, and from his personal knowledge of the amount of rents received from time to time under said lease and the

renewals thereof, and the plaintiffs are justly entitled to recover therefrom \* from the said defendant the sum of eight hundred and fifty-eight and 36/100 dollars (\$858.36) with interest from the first day of October, 1902, and deponent further says there are no counterclaims, discounts or set-offs existing in favor of the defendant, except as above stated to his knowledge."

The complaint in the action avers that the defendant is a foreign corporation, organized under the laws of the State of New Jersey; sets up the making of the lease to the defendant and the renewals thereof; the entry by the defendant into the occupation of the same; the amount of rents that have accrued thereon and the sum remaining due and unpaid, for which judgment is demanded. The verification of the agent states that the contents of the complaint are true to his knowledge, except as to matters alleged upon information and belief; that the reason why the verification is not made by plaintiffs, or any of them, is that none of them resides in the county of New York, where deponent resides, and that all of the material allegations of the complaint are within the personal knowledge of the deponent, he having had charge of all the business affairs of the plaintiffs for a period covering the last ten years, and made the lease and renewals referred to in the complaint, and has collected the rents during the entire period thereof. The defendant moved to vacate the attachment upon the papers on which it was granted, the claim being that the averments contained in the affidavit and complaint were insufficient to support the same. The motion to vacate was denied, and from the order entered thereon the defendant appeals.

The first contention of the defendant is that the affidavit is insufficient in that it fails to state that the plaintiffs are entitled to recover a certain sum "over and above all counterclaims known to plaintiffs." The language of section 636 of the Code of Civil Procedure in this regard states that "the affidavit must show that the plaintiff is entitled to recover a sum stated therein over and above all counterclaims known to him."

The criticism by the defendant upon the proof in the present case is, that while the Code requires that the statement shall be to the effect that it is over and above all counterclaims known to the

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\* *Sic.*

plaintiffs, the statement of the affidavit is that it is over and above all counterclaims known to the deponent, and, therefore, that the plaintiffs' knowledge upon the subject is neither given nor made to appear. This criticism is unavailing. The knowledge of the agent with respect to the subject-matter of the action is the knowledge of the plaintiffs, and as it appears that the whole transaction was within the agent's personal knowledge, the statement made by the agent becomes the statement of the plaintiffs and is to be taken the same as though the plaintiffs had made the affidavit. The sufficiency of such averment was decisively settled in *Washburn v. Carthage National Bank* (86 Hun, 396). There the affidavit was made by an agent and the statement was "That there were no counterclaims, discounts or offsets existing in favor of the defendant to the knowledge or belief of the deponent." The court said: "These allegations were, we think, a sufficient compliance with the statute, and although they did not conform to its precise wording, yet they were within the spirit of its provisions, and sufficient to give the judge jurisdiction to grant the attachment." A number of cases are cited supporting the doctrine. Upon appeal this case was affirmed upon the opinion below (155 N. Y. 690).

It is the further contention of the defendant that the plaintiffs have failed to show that it is a foreign corporation. The affidavit avers in terms that such is the fact, and that it was organized and existed under the laws of the State of New Jersey. It then proceeds to state that deponent obtained information of such fact from the Partnership and Corporation Directory, issued by a book binding company, and from the Directory of Foreign Corporations, issued by J. B. Lyon & Co., of Albany, and that deponent telegraphed to the Secretary of State of New Jersey asking for information upon such subject, and received a reply thereto, stating that the defendant was a corporation organized and existing under the laws of the State of New Jersey. This evidence, taken in connection with the fact that the lease was executed in the name of the defendant, that it was doing business in the State of New York under such name, and appeared in publications which purported to give to the general public its status, makes out a sufficient case in support of the positive statement that it was such corporation. The complaint also avers that it is a foreign corporation and by virtue

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of the provisions of section 1776 of the Code of Civil Procedure, it is required that the defendant make an affirmative verified allegation that it is not a corporation in order to put such fact in issue. It is evident, therefore, that the affidavit is sufficient in this respect.

It is further contended that it is not alleged in the complaint that the plaintiff de Tuite is an executrix. This objection cannot avail. She sues personally and as executrix, and if she has failed to establish the latter fact, nevertheless, she and her co-plaintiffs also sue in their individual capacity, and are, therefore, entitled to maintain the action. In addition to this it appears by positive averment that the plaintiffs and the defendant entered into the written contract of lease, and under such circumstances the defendant is estopped from denying the title of the plaintiffs to the premises, or the right to enforce the lease in the same capacity in which they executed the same.

We conclude that the proof was sufficient to justify the issuance of the warrant of attachment. The order appealed from should, therefore, be affirmed, with ten dollars costs and disbursements.

O'BRIEN, INGRAHAM and McLAUGHLIN, JJ., concurred; VAN BRUNT, P. J., dissented on the ground that the affidavit as to counterclaims in no way complies with the requirements of the Code.

Order affirmed, with ten dollars costs and disbursements.

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HENRY R. WORTHINGTON, Appellant, v. WILHELM GRIESSER and Others, Respondents.

*Pleading — allegation as to liability imposed by the laws of another State for pretending to be officers of a pretended corporation — when it is contractual and not penal — liability at common law.*

The complaint in an action alleged "that it was at all the times hereinafter mentioned, and still is, the law of the State of Illinois that whenever any person or persons, being or pretending to be officers or agents or directors of any stock corporation or pretended stock corporation organized or pretended to be

organized under the laws of the State of Illinois, assume to exercise corporate powers or use the name of any such corporation or pretended corporation, without first filing, or causing to be filed on behalf of such corporation or pretended corporation, in the office of the recorder of deeds of the county where the principal office of such corporation or pretended corporation is located, a certificate of the complete organization of the said corporation, issued by the Secretary of State of the State of Illinois, such persons are jointly and severally liable for all debts and liabilities made or contracted by them in the name of such corporation or pretended corporation; and that such liability may be enforced against such persons in an action at law, brought against them or any of them in any court of competent jurisdiction, by any person with whom such debt shall have been contracted;" that at all the times in the said complaint mentioned the defendants pretended to be officers and agents and directors of a pretended stock corporation organized under the laws of the State of Illinois, and that they did assume to exercise corporate powers and to use the name of the said pretended corporation without having filed, or caused to be filed on behalf of the said corporation, a certificate required by law to be filed in the office of the recorder of deeds in the county wherein the principal office of such company was located; that between the 20th day of December, 1898, and the 19th day of January, 1899, the defendants "so assuming and pretending as aforesaid," did purchase from the plaintiff, in the name and on the alleged behalf of said pretended corporation, certain goods, wares and merchandise of the value in all of the sum of \$752, which said sum defendants promised to pay to plaintiff, and upon which there is still due and owing to the plaintiff the sum of \$678.21. For a second cause of action the plaintiff, upon the facts set forth in the first cause of action, sought to charge the defendants with liability upon a draft drawn in payment for the goods mentioned in the first cause of action.

*Held*, that from the express averments of the complaint it appeared that no corporation was ever in fact organized and that the defendants pretended to be officers of a corporation having no legal existence;

That it was only necessary for the plaintiff to show that the pretense that there was an existing corporation was made at the time the transaction in suit was had and that the statute set forth in the complaint was then in force; that such facts were averred in the complaint in plain and unmistakable language;

That, as the action was not brought upon the theory that a corporation actually existed, it was not necessary for the complaint to aver the time when the statute referred to therein was adopted or whether or not it was retroactive or when the corporation in question was organized;

That, as the liability sought to be enforced against the defendants was incurred in the purchase of goods, it was purely contractual and not penal, and that the courts of the State of New York would enforce the same;

That, independent of the question whether the complaint was sufficient to bring the case within the terms of the Illinois statute, it stated facts sufficient to impose a common-law liability upon the defendants as individuals engaged in a joint venture.

APPEAL by the plaintiff, Henry R. Worthington, from a judgment of the Supreme Court in favor of the defendants, entered in the office of the clerk of the county of New York on the 19th day of March, 1902, upon the dismissal of the complaint at the opening of a trial at the New York Trial Term, upon the ground that the complaint did not state facts sufficient to constitute a cause of action.

*Laurence Arnold Tanzer*, for the appellant.

*Emanuel J. Myers*, for the respondent Griesser.

HATCH, J. :

The complaint avers, among other things, "that it was at all the times hereinafter mentioned, and still is, the law of the State of Illinois that whenever any person or persons, being or pretending to be officers or agents or directors of any stock corporation or pretended stock corporation organized or pretended to be organized under the laws of the State of Illinois, assume to exercise corporate powers or use the name of any such corporation or pretended corporation, without first filing, or causing to be filed on behalf of such corporation or pretended corporation, in the office of the recorder of deeds of the county where the principal office of such corporation or pretended corporation is located, a certificate of the complete organization of the said corporation, issued by the Secretary of State of the State of Illinois, such persons are jointly and severally liable for all debts and liabilities made or contracted by them in the name of such corporation or pretended corporation; and that such liability may be enforced against such persons in an action at law, brought against them or any of them in any court of competent jurisdiction, by any person with whom such debt shall have been contracted;" that at all the times in the said complaint mentioned, the defendants pretended to be officers and agents and directors of a pretended stock corporation organized under the laws of the State of Illinois, and that they did assume to exercise corporate powers and to use the name of the said pretended corporation without having filed, or caused to be filed on behalf of the said corporation, a certificate required by law to be filed in the office of the recorder of deeds in the county wherein the principal office of such company was located;

that between the 20th day of December, 1898, and the 19th day of January, 1899, the defendants, "so assuming and pretending as aforesaid," did purchase from the plaintiff, in the name and on the alleged behalf of said pretended corporation, certain goods, wares and merchandise of the value in all of the sum of \$752, which said sum defendants promised to pay to plaintiff, and upon which there is still due and owing to the plaintiff the sum of \$678.21.

The complaint further avers for a second cause of action a liability, based upon the facts alleged in the first cause of action, upon a certain draft or bill of exchange, which, the complaint avers, was drawn by the defendant Griesser, acting for and on behalf of said pretended corporation and for the defendants, wherein and whereby the said defendants and the said Griesser directed the payees therein to pay to the plaintiff the sum of \$678.21; that said draft or bill of exchange was duly presented to the payees named therein, but that neither the said defendants, nor the said pretended corporation, nor the defendant Griesser, had in the hands of the payees funds sufficient for the payment of the same, and payment was thereupon refused, of all of which the defendants received due notice, and for which sum plaintiff demands judgment. The ground of the decision of the learned court below rested upon the fact that the complaint did not aver the time when the statute was adopted creating the liability against the defendants, or when the corporation of which the defendants pretended to be officers was organized; that it did not appear that the statute as set forth in the complaint was retroactive, or that it applied to any corporation duly organized before its enactment; that it was essential to aver in the complaint that such statute applied to a corporation theretofore organized, or thereafter organized, and that in either event it was necessary that the complaint should contain averments showing that the pretended corporation was embraced within and subject to the terms and provisions of the act. It is evident that the learned court below regarded the effect of the averments of the complaint as relating to an organized and existing corporation, and if it be so treated his reasoning resulting in the dismissal of the complaint may perhaps be upheld; but the difficulty with the conclusion is that by the express averments of the complaint it appears that no corporation was ever in fact organized; but that the defendants

pretended to be officers of a corporation having no legal existence. The law, therefore, if it be as stated in the complaint, would necessarily apply to these defendants at the particular times when the indebtedness was incurred, for the reason that its averments are that such was the law when these defendants pretended to be officers of a corporation. The act itself applies to the pretense and creates a liability based thereon. If the corporation in fact, as the complaint alleges, is a mere pretense, it was a continuing one, and the liability which the act sought to create was based upon such claim; consequently it would find application whenever the pretended claim was asserted, so long as there existed no legal incorporation, and in order to establish liability it was only necessary to show that such law was in force at the time when the liability was created, and that the pretense that there was an existing corporation was made at the time the transaction was had resulting in the creation of the liability. Such are the averments of the complaint in plain and unmistakable language. The case of *Barnes v. Wheaton* (80 Hun, 8), relied upon by the learned trial court, has no application to such a case. Therein the corporation had been formed, and the liability which was sought to be established was against the stockholders of such corporation. The law which imposed liability was the provisions of the statute of a sister State, and as there was an actual corporation in existence, the liability of the stockholders therein depended upon the application of the law to them. Under such circumstances the court held that it was essential to the statement of a cause of action that it be made to appear that the stockholders were brought within the terms and provisions of the statute, and that a mere general averment of the existence of such law was not sufficient for the purpose. Herein no such question arises. This is not an action which seeks to impose liability upon these defendants as stockholders of any corporation. The liability is sought to be imposed for the reason that the defendants were pretending to be something which they were not, in contravention of a statute which fastened liability upon them for such acts, and the sufficiency of the averments for such purpose is clear. (*Hagmayer v. Farley*, 23 App. Div. 426.)

The further ground upon which the court held the complaint insufficient was based upon the view that the statute was penal in character, and, therefore, to be strictly construed; that as it



attempted to impose upon directors of a corporation a liability not arising out of contract or known to the common law, it could not be supported, as the courts of this State would not enforce such a liability. The case relied upon to support this doctrine is that of *Marshall v. Sherman* (148 N. Y. 9). Therein the liability sought to be established was against the stockholders of a corporation of a foreign State which had become insolvent; the liability created by the statute was penal and not contractual. Under such circumstances it was held that there was no obligation of comity to enforce the liability of the stockholders for the debts of the corporation. This case is quite different and rests upon different principles of law. The liability sought to be established in this action, as appears by the complaint, is based purely upon contract. It is averred in terms that the liability was incurred for the purchase of certain goods, which were sold and delivered to the defendants, and for which the draft, as heretofore stated, was drawn in payment. There is, therefore, not a single element in the case of a penal character. The law of the State of Illinois is in substance and effect a declaration of the common law of this State. The defendants pretended to be something which they were not, but they nevertheless contracted a liability in a joint undertaking for which they agreed to pay; thereby they charged themselves with a personal liability for the payment of the obligation created, and the statute declares such to be the legal result of their action. The obligation is, therefore, contractual and the courts of this State will enforce the same in a proper action. (*Stoddard v. Lum*, 159 N. Y. 265.)

Aside from this question, however, it seems to be clear that the facts as averred in the complaint, are sufficient in all respects to charge the defendants with liability at common law. As there was no corporation in existence when they assumed to contract, and the goods were sold and delivered to them, and they were engaged in a joint venture, all of the elements existed to charge them with liability upon principles applicable to a copartnership; such is the common law of this State. (*King v. Barnes*, 109 N. Y. 267; *Wilcox v. Pratt*, 125 id. 688.) In this view it was entirely immaterial whether the averments of the complaint were sufficient to bring the defendants within the terms of the statute or not, for liability is made to depend, not upon their acts as officers of a corporation, but

as individuals engaged in a joint venture. In either event, we think the complaint states a good cause of action against these defendants; it was, therefore, error to dismiss it.

It follows that the judgment should be reversed and a new trial granted, with costs to the appellant to abide the event.

VAN BRUNT, P. J., O'BRIEN, INGRAHAM and McLAUGHLIN, JJ., concurred.

Judgment reversed, new trial ordered, costs to appellant to abide event.

JOHN D. MOORE, Respondent, v. MONUMENTAL MUTUAL LIFE  
INSURANCE COMPANY, Appellant. 77 209  
f 78 645

*Service of a summons — a person who collects the dues of members of a fraternal insurance association is not a managing agent.*

Evidence that a woman residing in Brooklyn, who was the secretary of the Brooklyn branch of a fraternal insurance association, collected the dues of the members of that branch and transmitted them to the principal office of the association at Baltimore, Md., and that after the association had become insolvent and the members thereof had been transferred to the Monumental Mutual Life Insurance Company, which was incorporated under the laws of the State of Maryland and had its principal office and place of business in the city of Baltimore, she collected the premiums due from the members of the Monumental Mutual Life Insurance Company residing in her vicinity and transmitted them to the Baltimore office of that company, is insufficient to establish that she was a managing agent thereof within the meaning of section 482 of the Code of Civil Procedure authorizing the summons in an action against a foreign corporation to be served upon the managing agent thereof.

APPEAL by the defendant, the Monumental Mutual Life Insurance Company, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 1st day of October, 1902, denying the defendant's motion to vacate and set aside the service of the summons in the action.

*Joseph W. Welsh*, for the appellant.

*William Blaikie*, for the respondent.

HATCH, J. :

The defendant is a fraternal insurance corporation, having its principal office and place of business in Baltimore, in the State of Maryland, and is incorporated under the laws of that State. The service of the summons and complaint in this action was claimed to have been effected by delivering a copy thereof to Mary C. Jackey at her residence in the city of Brooklyn in this State. It is not claimed in the moving papers that the person so served is one of the officers of the defendant corporation or that she is a person designated for the purpose of receiving service of the papers, as provided by subdivision 2 of section 432 of the Code of Civil Procedure. She is not the cashier nor a director of the defendant, and it is admitted by the parties that there are no such persons in the State. The whole claim upon which the service is sought to be supported is that Mary C. Jackey is a managing agent of the defendant within the meaning of the Code (§ 432, subd. 3) authorizing service to be made upon her. It appears by the proofs submitted in support of the claim that she is a managing agent that she was secretary of Branch 47 of the Iron Hall Insurance Association, and that such branch was located in the city of Brooklyn ; that the principal office and place of business of the Iron Hall Association was in Baltimore, and Mary C. Jackey, as such secretary, received all the dues from the members of Branch 47 and transmitted them to the principal office at Baltimore ; that the Iron Hall Association having become insolvent all the members were transferred to the defendant company ; that Mary C. Jackey after such transfer continued to receive and has for several years been receiving the dues from members residing in her vicinity and transmitting them to the defendant company at Baltimore, Md. The affidavits state generally that the said Jackey transacts the business of the defendant and collects the premiums from the members, and that the several deponents know of their own knowledge that she has devoted herself solely as an agent of the defendant for the transaction of its business for a period of about twelve years, and that she is the agent and representative of the defendant. Only a single fact is stated, viz., that Mary C. Jackey collects premiums from the members and transfers them to the home office. Every other statement relating to her connection with the defendant, as agent or otherwise, is a mere conclu-

sion. It is said that she transacts the business of the defendant corporation in Brooklyn. What she does in that connection is not averred, beyond the collection of premiums, and no fact is stated by which it is made to appear that she does any other business for the defendant. The statement that she is the agent of it is a mere conclusion, and adds nothing in support of the claim that she is a managing agent. The case, therefore, comes to rest upon the proof as to her being a managing agent, so far as the plaintiff's affidavits are concerned, to the collection and remittance of the premiums collected. Such fact is not sufficient to establish a managing agency. It only shows that she is agent for this limited purpose, and such proof is not sufficient to bring her within the terms of the Code as a managing agent upon whom service may be made. (*Vitolo v. Bee Pub. Co.*, 66 App. Div. 582.)

In addition to this, it appears by the affidavits submitted in opposition to the motion that Mary C. Jackey does not act as the agent of the defendant in the collection and remittance of the dues of the members located in Brooklyn; but that in so doing she acts as agent for the members paying the dues. The president of the defendant states positively in his affidavit that she is not an officer, director, cashier, agent or employee of the defendant. Under the proof as it appears, eliminating the conclusions contained in plaintiff's affidavits, it is quite as consistent with the fact that she collects the moneys as agent of the persons paying the moneys and remits it to the defendant, as that she performs such service as the representative of the defendant. Clearly, therefore, the proof is insufficient to establish a managing agent upon whom the Code authorized service to be made. So far as the affidavits show, the transaction of business by other persons, whether sufficient or not to establish them as managing agents, cannot have any force in support of the service which has been attempted to be made. No service has been made upon such persons, and manifestly the unauthorized service of a summons and complaint cannot be sustained by showing that there is a representative of the defendant upon whom proper service could have been made, but was not. It is clear, therefore, that the proof of service in this case is insufficient, and the motion to set it aside should have been granted.

Other questions were raised, but it is not essential to a disposition of the present motion that they be considered.

It follows that the order should be reversed, with ten dollars costs and disbursements, and the motion to set aside the service granted, with ten dollars costs.

VAN BRUNT, P. J., O'BRIEN, INGRAHAM and McLAUGHLIN, J.J., concurred.

Order reversed, with ten dollars costs and disbursements, and motion granted, with ten dollars costs.

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84	464

CHARLOTTE MULLER, by INGLE CARPENTER, her Guardian ad Litem, Respondent, v. HARRY BAMMANN, by JOHN FREDERICK BAMMANN, his Guardian ad Litem, Appellant.

*Suit by an infant in forma pauperis — pecuniary ability of the guardian.*

Where an action is brought by an infant through a guardian *ad litem*, the infant will not be denied leave to prosecute the action as a poor person simply because the guardian *ad litem* is possessed of sufficient means to pay the expenses of the action unless it appears that such guardian *ad litem* is a parent of the infant.

*Rutkowsky v. Cohen* (74 App. Div. 415) explained.

APPEAL by the defendant, Harry Bammann, by John Frederick Bammann, his guardian ad litem, from an order of the Supreme Court, made at the New York Special Term, bearing date the 7th day of October, 1902, and entered in the office of the clerk of the county of New York, denying the defendant's motion to compel the plaintiff to furnish security for costs, and granting the plaintiff leave to prosecute the action as a poor person.

*Edwin F. Stern*, for the appellant.

*Ingle Carpenter*, for the respondent.

HATCH, J. :

Under date of September 5, 1902, Ingle Carpenter was appointed guardian *ad litem* of Charlotte Muller, an infant under the age of fourteen years, and qualified as such guardian. On September

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sixth an *ex parte* order was granted by the court allowing the plaintiff to sue as a poor person. Thereafter the summons was served on the defendant, who appeared in the action by his guardian *ad litem* and made a motion to vacate and set aside the last-named order. This motion was granted, with leave to the plaintiff to renew the application. Subsequently, a motion was made upon notice to the defendant for leave to sue as a poor person, and a hearing was had thereon, at which time the defendant also moved the court for an order requiring the plaintiff to give security for costs. This application resulted in an order authorizing the infant, Charlotte Muller, to prosecute the action as a poor person, and counsel was assigned for the prosecution thereof. The defendant's motion to compel plaintiff to file security for costs was denied. From this order the defendant appeals.

It is not claimed but that the papers upon which the application was made conformed in all respects to the provisions of the Code regarding such practice (§ 458 *et seq.*), or but that the averments contained therein were sufficient to authorize the court to exercise its discretion upon the application. Whether so claimed or not, the proof is sufficient for such purpose. Under such circumstances, the order authorizing the prosecution of the action as a poor person was properly granted. (*Feier v. Third Ave. R. R. Co.*, 9 App. Div. 607.) It is said, however, that this court laid down an entirely different rule in *Rutkowsky v. Cohen* (74 App. Div. 415) and that under this authority the application should have been denied. It is not to be controverted that there is ground furnished by the latter decision for this contention. In the opinion which was handed down upon the decision of that appeal it was made to appear that the guardian had shown himself to be responsible upon his application to be appointed as such, and that, therefore, the application for leave to prosecute might have been properly denied unless it was made to appear that such guardian did not have, at the time the application was made for leave to prosecute as a poor person, money or property sufficient to give security for costs. The opinion refers to the guardian exclusively, and is most unfortunate in this respect, for the reason that it was not the intention of the court to determine that when the guardian was possessed of sufficient means an order for leave to prosecute as a poor person would be denied. Such a

conclusion would be in direct conflict with the decision in the *Feier Case (supra)*, and would nullify the provisions of the Code authorizing an order to sue as a poor person in a case of infancy, for, upon such application, the person proposed as guardian must show that he is responsible, and until such guardian be appointed an infant cannot move at all. So that, under such rule, in all cases security would be required to be filed for costs, and this would result in the denial of the application of an infant to sue as a poor person in every case. In the *Rutkowsky Case (supra)* the parent of the infant was also her guardian *ad litem*, and the view which the court took was that, when the parent was possessed of sufficient means to furnish the security required, the court would deny the application; and as in that case it appeared that the parent was possessed of means sufficient for such purpose, and the affidavits failed to disclose that he was not so possessed of money or property sufficient for that purpose at the time when the application was made, the motion would be denied. He was referred to in the opinion as the guardian, but the rule in fact was not made applicable to him in such capacity, but in his relation as parent. The case, therefore, upon the record, however misleading may be the opinion, does not furnish a conflict of authority with the *Feier Case (supra)*, nor did the former case finally go upon such ground. The order was reversed, for the reason that the consent of the attorneys to prosecute without compensation was not made a provision of the order as required by the Code, and for this reason the order was refused. The case will be an exceptional one in which an infant will be allowed to sue as a poor person, where the parents of such infant are responsible and able to furnish security. The *Rutkowsky Case (supra)* simply made application of such proposition. In the present case the papers are sufficient in form and in substance, and the order which was made was, therefore, proper and should be affirmed, with costs.

VAN BRUNT, P. J., O'BRIEN, INGRAHAM and McLAUGHLIN, JJ., concurred.

Order affirmed, with costs.

MARGARET ROBINSON, Respondent, v. SUPREME COMMANDERY,  
UNITED ORDER OF THE GOLDEN CROSS OF THE WORLD, Appellant.

*Insurance—question as to other insurance “in what company?”—answer stating only one company when the applicant was insured in two—a physician is incompetent to testify as to the cause of his patient’s death—his certificate filed in the New York city health department is also incompetent.*

An application for membership in an assessment beneficiary order contained a number of questions and answers, among which was the following: “5. A. Is there now any insurance on your life? Yes. B. If so, in what company and for what amount? Temples of Liberty; \$1,000.”

At the end of the questions and answers was a printed clause to the effect that the applicant agreed “that if there be, in any of the answers herein made, any untrue or evasive statements, misrepresentations or concealment of facts, \* \* \* then all claims on the Benefit Fund \* \* \* shall be forfeited and lost by me.”

At the time the application was made the applicant was insured in the Prudential Insurance Company of New Jersey for the sum of \$158.

*Held*, that if the insured intentionally concealed the fact that he was insured in the Prudential Insurance Company, such concealment would not constitute a breach of warranty, but would furnish a basis for avoiding the contract on the ground of fraud;

That, as the language of the question was in the singular, the applicant might well understand that the beneficiary order simply desired him to specify one other organization or company in which he was insured, and that it could not be said, as matter of law, that his failure to disclose his insurance in the Prudential Company was a fraudulent concealment of facts.

Where, in an action upon a beneficiary certificate of life insurance, it is alleged as a defense that the insured made a false representation as to the cause of his father’s death, the physician who attended the insured’s father during his last illness is incompetent, under section 884 of the Code of Civil Procedure, to testify on behalf of the defendant, an assessment beneficiary order, as to the cause of his patient’s death.

The death certificate made by such attending physician and filed, pursuant to law, with the health department of the city of New York, is not admissible to prove the cause of death, notwithstanding the provision of section 955 of the Code of Civil Procedure, which provides that official records which have remained on file in certain public offices, including the health department of the city of New York, for a period of twenty years “shall be presumptive evidence of their contents, and shall be receivable in evidence as such upon any trial in any of the courts of this State in any controversy pending therein between any parties.”

APPEAL by the defendant, Supreme Commandery, United Order of the Golden Cross of the World, from a judgment of the Supreme



Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 28th day of May, 1902, upon the verdict of a jury rendered by direction of the court, and also from an order entered in said clerk's office on the 29th day of May, 1902, denying the defendant's motion for a new trial made upon the minutes.

*Alfred B. Cruikshank*, for the appellant.

*Charles Blandy*, for the respondent.

LAUGHLIN, J. :

The action is upon a beneficiary certificate issued by the defendant to William S. Robinson for the benefit of his mother, the plaintiff.

The first ground upon which the appellant contends that it is not liable is that the complaint fails to state and the evidence fails to establish a cause of action against it. The precise contention of the appellant is that neither the complaint nor the evidence shows that the appellant is an assessment beneficiary order, that the decedent was a member thereof or that there is any fund for the payment of the claim. It is alleged in the complaint that the appellant is a corporation duly organized under the laws of the State of Tennessee; that the decedent was duly elected and admitted as a member of the "New Amsterdam Commandery, United Order of the Golden Cross, located in New York, N. Y.;" that subsequently thereto the defendant executed and delivered to the decedent a benefit certificate which recited his election and admission to membership in said commandery; that he was "a contributor to the Junior Class Benefit Fund of this Order;" that his application for membership and the statements certified by him to the medical examiner were on file in the office of the supreme keeper of records, and were made a part of the contract, and that it was issued upon condition that he comply "in the future with the laws, rules and regulations now governing the said Commandery and fund, or that may hereafter be enacted by the Supreme Commandery to govern said Commandery and fund." The certificate further recited that "these conditions being complied with, the Supreme Commandery, United Order of the Golden Cross (being the defendant), hereby promises and binds itself to pay out of its Junior Class Benefit Fund to Margaret

Robinson, mother, in accordance with and under the provisions of the law governing said benefit fund, and upon satisfactory evidence of the death of said member and upon the surrender of this certificate, the sum of Two thousand dollars, provided the said benefit fund of said class reaches the sum of Two thousand dollars at the assessment called in payment of this certificate, and if said assessment shall not reach the said sum of Two thousand dollars there shall be paid on said certificate all or a proportional part of the fund received from the then membership in one assessment; and further, provided that said member is in good standing in this order at the time of his death; that this certificate shall not have been surrendered by said member and another certificate issued at his request, in accordance with the laws of this order. And provided also that the suspension, disconnection or expulsion of said member shall work an immediate forfeiture of all claims of said member on the Benefit Fund of the Order, also the forfeiture of the claims of the beneficiaries named in this certificate."

The complaint duly alleges the acceptance of the certificate in writing upon the conditions therein named, the death of the member while in good standing before the surrender of the certificate or change of beneficiary and "that the Junior Class Benefit Fund reached the sum of Two thousand dollars at the assessment called in payment of said certificate, or would have reached said sum if said assessment had been called," and that payment has been duly demanded and refused. The answer admits all of these allegations of the complaint except that the defendant denies that it has any knowledge or information sufficient to form a belief concerning the death of the member; but it admits the receipt of papers purporting to be proofs of his death. Upon the trial the plaintiff proved the death of the member and the presentation of the proofs of death.

The facts thus admitted and proved clearly made out a *prima facie* case of liability on the part of the defendant. In view of the allegations of the complaint which are admitted it appears either that the fund out of which the claim was payable was sufficient for the purpose or that it was insufficient through the omission of the defendant to levy an assessment. The appellant did not contest the claim on the ground of its inability to pay, but on account of alleged false representations on the part of the member in his application.

The next point to be considered relates to the defense based upon alleged misrepresentations of the decedent in his application for membership. It was recited in the application that the questions and answers contained therein were to form a part of the contract in case a benefit certificate was issued. The following questions and answers appear therein: "5. A. Is there now any insurance on your life? Yes. B. If so, in what company and for what amount? Temples Of Liberty; \$1,000." It was shown that the decedent was at that time insured in the Prudential Insurance Company of Newark, N. J., for the sum of \$158. At the end of the questions and answers and before the signature of the decedent there was a printed clause to the effect that the applicant agreed "that if there be, in any of the answers herein made, any untrue or evasive statements, misrepresentations or concealment of facts, \* \* \* then all claims on the Benefit Fund \* \* \* shall be forfeited and lost by me." It is not claimed that the decedent made any express misrepresentations, but it is contended that his answer did not disclose all of the truth, and was, therefore, evasive, and constituted a misrepresentation or concealment of fact as to his insurance in the Prudential Company. The rule is well settled that agreements of this character are strictly construed against the insurance company or order. It will be observed that the language of the question is in the singular, and it may well be that the applicant would understand thereby that the commandery merely desired him to specify one other organization or company in which he was insured. If he intentionally suppressed the truth the contract might be avoided on the ground of fraud, but it would not constitute a breach of warranty. (*Dilleber v. Home Life Ins. Co.*, 69 N. Y. 256.)

At the close of the evidence both parties moved for a direction of a verdict, and neither requested to go to the jury upon any question. The court directed a verdict in favor of the plaintiff for \$2,000 and interest. The parties thus by consent permitted the court to pass upon any question of fact there might be in the case. It cannot be said that there was a fraudulent concealment of facts as matter of law, and a finding that there was no fraudulent concealment would be supported by evidence.

The decedent died of consumption. In his application, in answer to a question, he stated that his father died of pneumonia,

and the appellant, contending that the father also died of consumption, sets up a breach of warranty in this regard. Upon the trial the appellant offered in evidence a certificate of the death of the deceased member's father made by the attending physician and duly filed with the health department of the city of New York, as required by law. This certificate recited that the cause of death was consumption. The evidence was excluded and the defendant excepted. The physician who made the certificate was called as a witness, and the appellant offered to prove the cause of death by him. This was excluded, and it is not claimed that its *exclusion* was error. It is well settled that such evidence is incompetent under section 834 of the Code of Civil Procedure, and that the incompetency of the physician as a witness ordinarily renders the certificate of death also inadmissible. (*Davis v. Supreme Lodge, Knights of Honor*, 165 N. Y. 159.) The policy of the law, as disclosed by this general provision of the Code, to exclude evidence of this character, has influenced the courts in all instances where the question has arisen to decide that local laws declaring such certificates evidence should not be so construed as to make them competent in actions between private parties. (*Davis v. Supreme Lodge, Knights of Honor, supra*; *Buffalo Loan, T. & S. D. Co. v. Knights Templar & M. M. A. Assn.*, 126 N. Y. 450.)

The appellant bases its claim to the admissibility of this evidence upon section 955 of the Code of Civil Procedure, which provides as follows: "All maps, surveys and official records, which shall have been on record or on file in the office of either the register of the city and county of New York, or the surrogate of said city, or any of the courts of record of said city, or the clerk of the city and county of New York, or any of the departments of said city as enumerated in section thirty-four of the New York City Consolidation Act (chapter four hundred and ten, laws of eighteen hundred and eighty-two) or in the office of the registers, surrogates, commissioners of public works, or kindred department or park department, for a period of twenty years or upwards prior to such trial, shall be presumptive evidence of their contents, and shall be receivable in evidence as such upon any trial in any of the courts of this State in any controversy pending therein, between any parties."

The former provisions of section 955 of the Code of Civil Pro-

cedure were repealed by chapter 416 of the Laws of 1877. The present section was added by chapter 522 of the Laws of 1892. The health department is one of the departments enumerated in the statute referred to in this section of the Code, and there can be no doubt but that certificates of death are "official records" on file in that department. If that section is to be construed literally, it would seem, therefore, that the certificate should have been received in evidence. It is urged by the appellant that the reason for the exclusion of a death certificate made evidence by local laws no longer obtains. It is contended that the incorporation of these provisions in the Code shows a legislative intent that the "maps, surveys and official records" to which reference is made shall be received in evidence and be presumptive evidence of the facts recited therein in private litigations in any court. It is not apparent that any reason exists why death certificates filed in the city of New York should be received as evidence when similar certificates filed elsewhere throughout the State pursuant to similar laws and for the same purposes, are incompetent as evidence in litigations between private parties. Rules of evidence should be uniform and it has not been the policy of the lawmakers in the past to depart from this rule. No reason for a change of policy in this regard exists now. It would, therefore, seem that this section of the Code should be construed in harmony with section 834, and not as a repeal of the latter as to evidence in a particular county of the State. Full force and effect may be given to the legislative intent in enacting the present section 955 of the Code without ascribing to the Legislature an intention to render death certificates competent evidence of the facts recited in actions between individuals where common-law evidence of such facts has been heretofore required. The main purpose seems to have been to remove the difficulty of proving the accuracy of old maps, surveys and official records which have been on file and accepted as correct for more than twenty years in the transaction of official business. It must be presumed that the members of the Legislature at the time of the enactment of this new provision in this section were aware of the decisions of the court against the admissibility in evidence in actions between private parties of death certificates filed pursuant to local laws. If the Legislature had intended to change this rule of evidence, we think it

would have prescribed that such certificates would be admissible from official files in any county; and if on the theory that there were special reasons justifying it, which are not apparent to us, it had been intended to make them admissible in the county of New York only, definite appropriate language to that end would have been employed. The certificate was, therefore, properly excluded.

It follows that the judgment and order should be affirmed, with costs.

VAN BRUNT, P. J., PATTERSON, INGRAHAM and HATCH, JJ., concurred.

Judgment and order affirmed, with costs.

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FRANK MULLER, Respondent, v. METROPOLITAN STREET RAILWAY COMPANY, Appellant.

*Evidence — compensation of a physician — what question in regard thereto, although objectionable, does not require a reversal — evidence sufficient to establish that a particular injury was caused by an accident.*

A question propounded upon the trial of an action to recover damages for personal injuries, as to what would be the reasonable and fair compensation of a physician "for professional consultation of even the most ordinary kind for the period of seven months, consultations having been had at two or three times a week during that period," is objectionable, but the answer, "about two dollars a visit," being competent, and the question not harming the defendant, it is not ground for reversal.

What evidence given on the trial of such an action is sufficient to warrant a finding that a hernia from which the plaintiff was suffering at the time of the trial was caused by the accident, considered.

VAN BRUNT, P. J., and INGRAHAM, J., dissented.

APPEAL by the defendant, the Metropolitan Street Railway Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 30th day of April, 1902, upon the verdict of a jury for \$1,250, and also from an order entered in said clerk's office on the 19th day of April, 1902, denying the defendant's motion for a new trial made upon the minutes.

*Addison C. Ormsbee*, for the appellant.

*Maurice B. Blumenthal*, for the respondent.

LAUGHLIN, J. :

This is an action to recover damages for personal injuries alleged to have been sustained by the plaintiff through the defendant's negligence. The plaintiff was injured on the 9th day of August, 1899, shortly before eight o'clock in the evening in alighting from a south-bound open car at Lexington avenue and Fifty-third street.

The first contention on the part of the appellant is that the verdict is against the weight of the evidence. The plaintiff was a passenger on the defendant's Fifty-ninth street line and was transferred to the Lexington avenue line. He testifies that on delivering the transfer to the conductor he notified the latter that he desired to stop at Fifty-third street; that he signaled the conductor at Fifty-fourth street and the conductor pulled the rope and the car came to a full stop; that he then got up from his seat and stepped down to the running board and the conductor was standing near him and saw him "and the car gave a jerk, a sudden start and threw me out." Neither the conductor nor motorman was called as a witness nor was their absence satisfactorily accounted for. The only other eye-witnesses to the accident who testified were a husband and wife who were passengers on the car and were called by the defendant. The testimony of the husband indicates that the plaintiff stepped from the car while it was in motion and before it had stopped; but the wife fully corroborates the plaintiff to the effect that he signaled the conductor and that the car came to a full stop before the accident. She does not corroborate the plaintiff on the point that the car started up again before he was injured; but she gives no satisfactory explanation of how he could receive the injuries while the car was standing still. In these circumstances it cannot be said that the evidence preponderated in favor of the defendant. The plaintiff's left shoulder was dislocated and he also claims that the injuries produced a hernia in his right groin. According to his evidence he fell rather sideways, facing the sidewalk, striking his left shoulder first and then his left hip, causing abrasions of the skin. A physician who examined him about two and a half years after the accident was permitted to describe

this hernia to the jury under the defendant's objection and exception that it had not been shown that the rupture was caused by the accident. This exception is urged as a ground for reversal. The plaintiff testified, before the reception of this evidence, that he had never experienced any pain or trouble in his right groin before the accident; that at the time he fell he heard something snap and had great pain in that region; that after the accident he had a swelling in the right groin which has remained there ever since; that the doctor prescribed a truss two or three days after the accident, and he has worn one since that time; that before the accident there was nothing the matter at the place where the swelling came on afterwards, and "that rupture that I claim that I have on my right groin now was the result of this accident, and I never had any difficulty prior to this accident." The physician who attended the plaintiff immediately after the accident, although called in his behalf, was rather an unwilling witness. He testified that he set and treated him for the shoulder, and did not make any other examination at that time; that the plaintiff was suffering from shock and bruises and complained of a little pain on the left side, but did not complain of any hernia; that the plaintiff's coat and vest only were removed; that he found no evidence of a hernia, but did not look for it; that a few days later he examined the plaintiff's right groin and found a hernia and prescribed a truss; that he did not examine the hernia with sufficient care at that time to know whether it was of recent origin or long standing. It thus appears, if the plaintiff's evidence was believed, that the hernia was caused by the accident. In so stating the plaintiff was not giving an opinion, and no objection to this evidence was interposed. He was testifying to a fact which he must have known was either true or false. His credibility was for the jury. There was, therefore, evidence upon which the jury could find that the hernia was caused by the accident, and it was entirely proper to allow the physician to describe it.

The plaintiff testified that his left ankle was injured and became swollen as a result of the accident. This evidence was subsequently stricken out by consent on the ground that those injuries were not pleaded. Later on counsel for the plaintiff, in a hypothetical question reciting the injuries sustained by the plaintiff and the circumstances under which they were inflicted, embraced the statement



that "his left ankle becomes swollen." This is now urged as a ground for a new trial. No objection was interposed to this question on the ground that it assumed facts not proven, nor was the attention of counsel for the plaintiff or of the court in any manner drawn to the fact that this evidence had been stricken out. It was omitted from the hypothetical question subsequently asked. The exception to the hypothetical question, therefore, can be of no avail to the defendant as presenting error in this regard.

The question as to what would be the reasonable and fair compensation of a physician "for professional consultation of even, the most ordinary kind for the period of seven months, consultations having been had at two or three times a week during that period," was objectionable, but the answer, "About two dollars a visit," was competent and did not harm the defendant.

It is conceded that the verdict is very small, if the plaintiff sustained the injuries of which he complains. The evidence made that a fair question of fact for the jury.

These views lead to the conclusion that the judgment and order should be affirmed, with costs.

PATTERSON and HATCH, JJ., concurred; VAN BRUNT, P. J., and INGRAHAM, J., dissented.

Judgment and order affirmed, with costs.

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THOMAS DWYER, Appellant, v. THE MAYOR, ALDERMEN AND  
COMMONALTY OF THE CITY OF NEW YORK, Respondent.

*Contract with a municipality — an architect's certificate required thereby must be produced or an excuse pleaded for not doing so — rights of the contractor where the city completes the work at less than the contract price — specifications requiring the construction of a watertight flue — the contractor does not guaranty the efficiency of the specifications to secure that result — right to change the specifications — claim for extra work enforced.*

Where a contract, made between the commissioners of the department of public parks in the city of New York and a building contractor, expressly provides that the furnishing of an architect's certificate shall be a condition precedent to the contractor's right to receive payment for any part of the work, if the contractor brings an action to recover a balance due under the contract upon the

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claim that he has made complete performance thereof, and does not produce the architect's certificate, he cannot recover upon the theory that the architect unreasonably refused to grant such certificate, unless he alleges that fact in his complaint.

Where it appears that the work was taken from the contractor and completed by the city pursuant to a notice given under the contract, and that the cost of such completion was considerably less than the balance unpaid upon the contract price, the contractor may, if he so elects, recover such balance without regard to the architect's certificate.

Where the plans and specifications furnished pursuant to the contract specify the manner in which an underground flue shall be constructed, and provide that such flue shall be rendered thoroughly watertight, the measure of the contractor's liability is to make the flue watertight so far as a construction in accordance with the plans and specifications will produce that result, but he does not guarantee the efficiency of the plans and specifications in that regard.

If the flue, after being constructed in accordance with the original plans and specifications, is found not to be watertight, a clause of the specifications providing, "Such details on a large scale or full size as may be necessary to more fully explain the general drawings will be furnished to the contractor at the proper time during the progress of the work. \* \* \*

"The various drawings and this specification are intended to cover a complete and first class job in every respect. Anything omitted in this specification and shown on the drawings, or *vice versa*, is to be done by the contractor without extra charge or expense," does not authorize the architect to alter the plans and specifications for the flue and require the contractor to reconstruct it in accordance with the altered plans and specifications without extra charge.

A provision in the contract that the contractor should make no claim for extra work, unless the same was agreed upon between the parties in writing, will not prevent the contractor from recovering for the work performed by him in reconstructing the flue pursuant to the directions of the architect and the board of park commissioners, as such provision related to work concededly not within the contract, and did not apply to changes and alterations in the work intended to be covered by the agreement.

Even if it should appear that the reconstruction of the flue was extra work within the meaning of the provision in question, the park commissioners, having authorized and directed such work to be done, would be estopped from contending that the plaintiff could not recover therefor because the contract required that an agreement in writing should be made concerning the same.

VAN BRUNT, P. J., and INGRAHAM, J., dissented.

APPEAL by the plaintiff, Thomas Dwyer, from a judgment of the Supreme Court in favor of the defendant, entered in the office

of the clerk of the county of New York on the 13th day of January, 1899, upon the dismissal of the complaint at the close of the plaintiff's evidence on a trial at the New York Trial Term.

*Charles J. Hardy*, for the appellant.

*Chase Mellen*, for the respondent.

LAUGHLIN, J. :

The plaintiff contracted with the city of New York, through the commissioners of the department of public parks, for the construction of a boiler house and engine room for the Metropolitan Museum of Art.

The complaint contains two causes of action ; the first is to recover \$669.30, the balance unpaid upon the contract ; the second, for damages caused by the wrongful rulings, orders and directions of the architect and board of park commissioners in requiring the plaintiff to do over again certain work which it is alleged he completed in accordance with the contract, plans and specifications, and also compelling him to furnish extra work, labor and materials under the wrongful claim that the same were embraced within the contract.

The allegations of the complaint with reference to the first cause of action proceed upon the theory of complete performance by the plaintiff. The specifications forming a part of the contract expressly provide that the architect's certificate that the contract has been faithfully performed with reference to the materials furnished and work done should be a condition precedent to the right of the plaintiff to payment for any part of the work. Upon the trial the plaintiff failed to show that the work was completed to the satisfaction of the architect, or that the latter had furnished a certificate to that effect. The complaint contains no allegation excusing the production of the architect's certificate. Evidence was offered, however, tending to show complete performance by the plaintiff in accordance with the contract and specifications and that the architect unreasonably withheld his certificate, insisting that the work had not been properly performed. The plaintiff made no motion to amend his complaint to conform to the proof in this regard. The judgment entered upon the nonsuit cannot be reversed unless the plain-

tiff established a *prima facie* case upon the complaint as it stood at the time the motion was granted, for he could only recover as matter of strict legal right according to the allegations of his complaint, even if the evidence would have justified an amendment and a recovery on another theory. The plaintiff was not entitled to recover on the theory of complete performance under this contract without the production of the architect's certificate unless he laid the foundation in his complaint for the evidence excusing compliance in this regard. (*Weeks v. O'Brien*, 141 N. Y. 199.) It is true that in this case, as in the case of *Weeks v. O'Brien* (*supra*), the evidence developed the fact that this work was taken from the plaintiff and completed by the city pursuant to a notice claimed to have been given under the contract, and it further appears that the cost of completion was considerably less than the balance unpaid on the contract price. Had the plaintiff so elected, he would have been entitled to recover this balance in these circumstances without regard to the architect's certificate (*Weeks v. O'Brien*, *supra*); but he made no such election, and, so far as is disclosed by the record, his contention throughout the trial was that he was entitled to recover the full balance without deduction for any expenditure by the city. The court, therefore, committed no error in dismissing the complaint as to the first cause of action. We think, however, that the proof warranted a recovery on the second cause of action. The complaint relating to this cause of action alleges, among other things, that "the defendant, through its officers and agents, would not permit the plaintiff to proceed and carry out the said contract in a reasonable, proper and expeditious manner, but by and through the wrongful act, neglect and default of the defendant, its officers and agents, the plaintiff was hindered and delayed and put to great loss and expense by reason of said wrongful act, neglect and default, and was compelled to do his (plaintiff's) work at a largely increased cost by reason thereof.

"That among other things the defendant, its officers and agents, compelled the plaintiff to attempt to make a certain horizontal boiler flue under the cellar floor of the said boiler house watertight, which was an impracticable thing to do, and not required by the plans and specifications of said contract. \* \* \* Compelled plaintiff to take down and rebuild horizontal flue at boiler house

after the same had been built by plaintiff according to the said contract and the plans and specifications thereof."

The plaintiff's testimony shows that he constructed this flue literally in accordance with the contract plans and specifications; that early in the construction of the work he notified the architect that the flue, if constructed according to the plans and specifications, would not be watertight, as was evidently intended; that he was subsequently directed by the architect to complete the flue without any change or alteration of the plans and specifications therefor; that after completion it was ascertained that the flue was not watertight, and the architect thereupon materially altered the plans and specifications with reference to the manner of constructing it, and directed the plaintiff to take it down and remove it, and reconstruct it in accordance with such altered plans and specifications; that plaintiff, insisting that he had performed his contract in this regard and was under no obligation to do the work over again in a different manner, appealed to the board of park commissioners protesting against the action of the architect, and was by them directed to reconstruct the work as required by the architect; that he also notified the architect and the board of park commissioners that the flue would not be watertight if constructed according to the amended plans and specifications; that he did reconstruct it in accordance therewith, and that the reasonable value of this work was \$1,604.51.

It is objected that the plaintiff cannot recover for this item for the reason that the flue as thus reconstructed was not watertight. The contract expressly provided that the work should be done "to the satisfaction of the Commissioners of the Department of Public Parks and the architect appointed by them and in accordance with the drawings, details and directions given or which may be given by the architect and in conformity with the specifications." The amended specifications require an excavation for the flue of sufficient width and depth to make it, when completed, of the size indicated on the plans, and further provided with reference to this flue as follows:

**" MASON WORK :**

" Line up the sides of excavation with four inches of brick and cover the bottom of flue with not less than 4 inches of rough concrete, composed of 3 parts of broken stone, 1 part clean sharp

sand, and 1 part Portland cement, made smooth, ready to receive asphalt. After the asphalt has been applied build 12" brick walls on both sides of the flue, laid in mortar as specified, and carry up to height required for roof beams.

"Pave the flue throughout with brick grouted in in cement mortar.

"ASPHALT:

"Cover the entire inside of flue, prepared as specified, with  $\frac{1}{4}$  inch of Seyssel rock asphalt, or equally good and approved brand, applied hot, so put on as to absolutely cover all crevices and joints, and render the same impervious to water.

"GENERALLY:

"The work is all to be performed in a thorough and mechanical manner, and rendered thoroughly watertight, all to be subject to the approval of the architect."

The provisions of the original and amended specifications with reference to the flue being impervious to water and watertight were the same. The legal effect of this contract was that the contractor undertook to construct the flue in accordance with the plans and specifications, and he was to make it watertight so far as a construction in accordance with the plans and specifications would produce that result; but he did not guarantee the efficiency of the plans and specifications in this regard. (*MacKnight Flintic Stone Co. v. Mayor*, 160 N. Y. 80.)

The specifications contain the following clause: "Such details on a large scale or full size as may be necessary to more fully explain the general drawings will be furnished to the contractor at the proper time during the progress of the work. \* \* \*

"The various drawings and this specification are intended to cover a complete and first class job in every respect. Anything omitted in this specification and shown on the drawings, or *vice versa*, is to be done by the contractor without extra charge or expense."

It is contended on the part of the city that these provisions authorized the architect to change the plans and specifications by detailed plans, and that they are authority for the changes which he made. This contention is untenable for two reasons. In the *first* place it was not intended to authorize the change of either the specifications or plans by enlarged detail plans or drawings, but only

to make more clear what might otherwise be obscure, and, *secondly*, the architect was not authorized to make any change or alteration in the plans or specifications after the work had been done in accordance with the plans and specifications at the time of performing it.

It is further contended that this was extra work, and that, inasmuch as it was provided in the contract that the contractor should make no claim for extra work unless the same was agreed upon between the parties in writing, no recovery can be had therefor. That provision of the contract relates to work concededly not within the contract, and not to changes and alterations in the work intended to be covered by the agreement. Furthermore, it is not contended that the board of park commissioners did not have authority to contract for this work even if it were extra work; and the board itself which made the contract, having authorized and directed the work, would be estopped from contending that the plaintiff could not recover therefor because the contract required that an agreement in writing should be made concerning the same. The architect wrongfully insisted that the plaintiff had not performed his contract with reference to the construction of the flue, not because he had not followed the plans and specifications, but because of the architect's blunder in preparing plans and specifications that would not accomplish the object desired, to wit, a watertight flue.

On this branch of the case the plaintiff was entitled to recover on the authority of *Gearty v. Mayor* (171 N. Y. 61). There is no basis for a distinction between that case and this. There, as here, the contract related to the performance of work for the park department, and the provisions of the specifications, so far as material, are almost identically the same, the only difference being that that case related to a pavement and the engineer had supervision of the construction, and the word "engineer" appears in the specifications where the word "architect" appears in the case at bar.

It follows, therefore, that the plaintiff made out a *prima facie* case for a recovery with reference to the cost of reconstructing this flue and it was error to dismiss the complaint. In this view it becomes unnecessary to consider the sufficiency of the complaint or proof with reference to the other items of damages claimed in the second cause of action.

The judgment appealed from should be reversed and a new trial granted, with costs to appellant to abide the event.

O'BRIEN and HATCH, JJ., concurred; VAN BRUNT, P. J., and INGRAHAM, J., dissented.

INGRAHAM, J. (dissenting):

The plaintiff made a contract with the defendant whereby he was to construct a boiler house and engine room in the Central Park in the city of New York for the use of the Metropolitan Museum of Art, for which the defendant agreed to pay the plaintiff the sum of \$47,700. There are two causes of action alleged in the complaint. The first is to recover the balance alleged to be due under the contract, and the second is to recover the damages sustained by the plaintiff by reason of the refusal of the defendant to permit him to carry out the contract in a reasonable, proper and expeditious manner. As a first cause of action the complaint alleges the making of the contract; that the plaintiff had fully performed all the conditions and covenants of the said agreement and fully completed the work in accordance with the terms and conditions of the contract, "and the same has been duly accepted by the defendant and its officers, and its acceptance duly certified in writing;" that the amount to be paid by the contract is \$47,700, of which the plaintiff has received the sum of \$47,030.70, leaving a balance due from the defendant to the plaintiff of \$669.30, for which sum plaintiff demands judgment. For a second cause of action the plaintiff alleges that while he was endeavoring in good faith to carry out the said contract in accordance with the terms and conditions thereof, "the defendant, through its officers and agents would not permit the plaintiff to proceed and carry out the said contract in a reasonable, proper and expeditious manner, but by and through the wrongful act, neglect and default of the defendant, its officers and agents, the plaintiff was hindered and delayed and put to great loss and expense by reason of said wrongful act, neglect and default, and was compelled to do his (plaintiff's) work at a largely increased cost by reason thereof."

The answer admits the making of the contract; alleges that the plaintiff entered into its performance and, except as specified, has fully completed the said work in accordance with the terms and



conditions of the contract; admits that the defendant has paid the plaintiff on account of the contract the sum of \$47,030.70, and no more; and then alleges that while the plaintiff was proceeding to execute and carry out the said contract, he "willfully and wrongfully neglected and refused to construct and complete in a proper manner, in accordance with his contract and the specifications and directions of the architect, a certain horizontal boiler flue under the cellar of the said boiler house, and to do certain asphaltting to the easterly wall of the boiler house, and to repair the roof thereof, whereupon the Commissioners of the Department of Public Parks, by virtue of the said provisions of the said contract, duly notified the plaintiff to discontinue all the work in his contract on such portion of said work; that thereupon the said plaintiff did discontinue work upon said portion or part, and the commissioners thereupon placed upon the said part to work at and complete the same, another person, to wit, one William L. Crow, and the same was completed by such other person; that the reasonable and proper cost of completing the same was the sum of \$553.30, as evidenced by the certificate of the architect of the defendant;" that the plaintiff also refused to carry out said contract in that he neglected to set up one steam jet pump for underground flue pipe fittings and valves, whereupon the said commissioners duly notified the plaintiff, in accordance with the terms of said contract, to discontinue all work thereunder, and the commissioners thereafter employed another person to do the work; that the reasonable and proper cost of completing the same was the sum of \$116, as evidenced by the certificate of the architect, and that by reason thereof the defendant deducted the amount paid for the completion of the contract from the amount due to the plaintiff, which is the difference between the amount to be actually paid to the plaintiff upon the completion of the contract and that actually paid to him.

By the contract which was introduced in evidence the plaintiff agreed that he would complete the entire work to the satisfaction of the commissioners of the department of public parks and in substantial accordance with the specifications and plans, and that he would not ask, demand, sue for, or recover for the entire work any extra compensation beyond the amount payable for the whole of the work in this contract stipulated which shall be actually performed

at the price therefor therein agreed upon and fixed; and further agreed that the certificate of the architect, appointed by the commissioners of the department of public parks, in charge of the work, should be the account by which the amount of materials furnished and the work done should be computed, and that the architect's certificate that the same had been faithfully performed so far in accordance with the requirements of the contract and filed with the said department, should be a condition precedent to the right "of the said party of the second part to payment for the work or any part thereof done by him under this agreement;" and further agreed that the work was to be done to the satisfaction of the commissioners of the department of public parks and the architect, "and work done not satisfactory to the said commissioners and the architect shall be immediately made good by the said party of the second part (plaintiff); or if he shall neglect or refuse to remove the materials or such work or materials as may be condemned by the architect when notified so to do by the commissioners of the department of public parks, by a written notice to be served on the contractor, either personally or by leaving it at his residence or with his agent in charge of the work, then the commissioners of the department of public parks may remove, or cause the same to be removed and satisfactorily replaced, by contract or otherwise, as they may deem expedient, and charge the expense thereof to the aforesaid contractor; and the expense so charged shall be deducted and paid by the parties of the first part out of such moneys as are or may become due under this agreement;" and also agreed that he would not be entitled to demand or receive payment for any portion of the aforesaid work until the same was fully completed in the manner set forth in the agreement, and such completion should be duly certified by the architect in charge of the work as provided by the contract; that "the action of the architect by which the said contractor is to be bound and concluded according to the terms of this contract, shall be that evidenced by his final certificate;" and thereupon the defendant agreed to pay to the plaintiff "the whole of the moneys accruing to the said party of the second part under this agreement, excepting such sum or sums of money as may be lawfully retained under any of the provisions herein contained for that purpose."

There was no allegation in the complaint that the certificate of the architect, as required by this contract, had been furnished, or that such certificate had been demanded of the architect and the delivery thereof unreasonably refused, the only allegation being that the plaintiff had fully completed said work in accordance with the terms and conditions of the said contract, and that the same had been duly accepted by the defendant and its officers, and its acceptance duly certified in writing. The contract having made the certificate of the architect a condition precedent to the right of the plaintiff to payment upon the work, or any part thereof, done by him under the agreement, and the obligation of the defendant to pay the plaintiff being limited to the amount allowed by the final certificate of the architect, to justify the recovery of any amount due under the contract the plaintiff was bound to allege and prove the delivery of the certificate by the architect, or the fact that the work had been actually performed and that the architect had unreasonably refused to deliver such certificate. The plaintiff having depended upon the contract and introduced it in evidence, his cause of action to recover the amount due under it must necessarily fail unless he produced the certificate of the architect, which, under the contract, was an essential prerequisite to his right to receive the contract price. Upon the cross-examination of the plaintiff, he testified that he carried out the architect's directions in accordance with certain modified specifications and plans, and that a paper shown to him was the final certificate of the architect. That paper, however, was not introduced in evidence, nor was there any proof, except this statement of the plaintiff, that a final certificate had been given by the architect, or that by it any amount was due to the plaintiff. There were introduced in evidence by the defendant two certificates of the architect, by one of which it appeared that one Clarke had furnished one steam jet pump at a cost of \$116, and by the other that one Crow had furnished certain work, labor and materials in excavating and refilling and cementing the wall in the boiler flue at a total cost of \$553.30. These two items thus certified by the architect aggregated the amount retained by the defendant and appear to be the items which the plaintiff seeks to recover by his first cause of action. It is quite clear, therefore, that owing to the failure to show that a certificate of the

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architect was furnished, or that one was unreasonably refused, the plaintiff must fail in his first cause of action.

The second cause of action is for the damages sustained by the plaintiff by reason of the failure of the officers of the defendant to allow him to complete his contract. There is no allegation in the complaint that plaintiff has performed extra work. It is the damages sustained by the refusal of the defendant to permit the plaintiff to proceed and carry out the contract in a reasonable, proper and expeditious manner that plaintiff seeks to recover by this second cause of action. This allegation would seem to be sufficient under the principle established in *Gearty v. Mayor* (171 N. Y. 61), and we have to determine whether the evidence is sufficient to sustain a recovery thereon. The plaintiff testified that he entered into this contract in September, 1892, and commenced the performance of the contract; that on December 7, 1892, he wrote a letter to the architect in which he stated that he was building the horizontal flue for the boiler house, but was afraid that water would come through, causing the flue to be damp or wet all the time, and asking the architect if he desired a change of the construction so as to overcome this pressure. In reply to this the architect stated that the contract called for a construction which, if faithfully carried out, would make this flue watertight; and shortly afterward the architect wrote to the plaintiff directing him to stop work for the winter. Subsequently, in March, 1893, the plaintiff, having resumed work, wrote to the architect saying that he had partly built the flue in accordance with his contract, but that it was not and would not be watertight, and asking for advice in regard to the matter. The architect subsequently called the plaintiff's attention to the water in this flue, directing him to cause it to be pumped out. In reply the plaintiff wrote that there was no special or general provision in the contract for taking care of this water and saying that it would be unjust to ask him to pump it out without compensation and refused to do so, and the plaintiff refused to do any further work in connection with the flue, telling the architect that he had constructed the flue in accordance with the contract and that he refused to take it down and construct it in a different way. Subsequently, and in November, 1893, the architect gave to the plaintiff an additional specification for the building of this flue. The plaintiff testified

that the flue, as shown on the details or plans delivered November 13, 1893, differs from that shown upon the plans annexed to the original contract inasmuch as it appears upon the drawing of November 13, 1893, that the walls were to be built in two sections, the inner a four-inch wall, the outer a twelve-inch wall, with three-fourths of an inch of asphalt between them, while the plan submitted under the original contract provided for a sixteen-inch wall without any asphalt; that the modified plan also shows under the floor of the flue a foundation of asphalt. He further testified that when he received these modified specifications and plans, he refused to do anything with it and appealed to the park board. He went before the park commissioners, when he was directed to go ahead and complete the work according to the new specifications, and the plaintiff testified that he did complete it according to such new specifications. In March or April, 1894, he claimed that the completion of the work under the new specifications was an extra expense to him of \$1,604.51, which is part of the damages included in the second cause of action. According to his testimony, what the plaintiff complains of seems to be that, having partially constructed this boiler flue according to the contract, the architect refused to accept it as a compliance with its provisions, but insisted that it should be built as provided in some supplemental plans and specifications, and that the plaintiff complied with such direction of the architect, enforced as it was by an order of the commissioners of public parks, and that for such work he was entitled to recover. But, as before stated, no such cause of action was alleged in the complaint. The plaintiff also testified that he did other work under the direction of the architect which was not provided for in the contract. As to these other items the plaintiff testified that they were done by him under the direction of the architect, who insisted upon it that they were required by the contract; that the plaintiff did not agree with him at any time that any of these items were properly included in his contract; that he did the work comprised in those items for the purpose of completing his job and getting the balance that was coming on the contract. By the contract the plaintiff agreed that he would not "ask, demand, sue for or recover for the entire work any extra compensation beyond the amount payable for the whole of the work in this contract stipulated, which shall be actually performed at the price

therefor, herein agreed upon and fixed," and that the contract and the specifications and the plans "may be modified and changed from time to time as may be agreed in writing between the parties hereto, in a manner not materially affecting the substance thereof, nor materially increasing the prices to be paid in order to carry out and complete more fully the work herein agreed to be done and performed, but such modifications and changes shall be agreed upon as aforesaid before any work shall be done thereunder." None of the provisions of this clause of the contract was complied with. No contract was made for extra work, nor was any modification for additional work agreed to in writing. The architect who was selected as the one to determine what was a due performance of the contract insisted that this work was to be done under the original contract as a compliance therewith. The plaintiff demands in the complaint the damages sustained because by wrongful acts of the agents of the defendant he was prevented from completing his work. He proves no illegal or wrongful act, but simply a disagreement between himself and the architect, the arbiter agreed upon between the parties, as to what work was within the contract, and the proof is not sufficient to justify a recovery upon the cause of action alleged in the complaint.

The case of *Gearty v. Mayor* (171 N. Y. 61) is not, I think, controlling. The contract there was essentially different from that in this case. The work there to be done was to pave a transverse road crossing Central Park at Ninety-seventh street from Fifth avenue west to Eighth avenue. The contract was to be entirely under the direction of the commissioners of the department of public parks, and the filing of the certificate of the engineer appointed by the commissioners was to be a condition precedent to the right of the plaintiff to payment under the contract, with a further provision that should any work be found defective or improperly done, such work was to be taken up, relaid or otherwise remedied to the satisfaction of the engineer; and if the contractor refused to correct such defective work when notified to do so, the commissioners of public parks were to employ the necessary men and material to do the work, with a further provision that the final certificate of the engineer should be conclusive as to the performance of the contract. The provisions of the contract and the nature of the work to be done in

that case were essentially different from those of the contract now under consideration. There was in that contract no provision for the appointment of an architect whose certificate was made by the contract a controlling element as to whether or not the contractor had completed the work according to the plans and specifications. In the *Gearty* case the work to be performed was the ordinary work of paving a street with granite blocks. The plaintiff proceeded without interruption with his work for sixty days and laid a considerable amount of expensive block pavement, receiving therefor the seventy per cent certificate of the commissioners and their engineer of construction, stating that there was justly due him a sum of money named for the work done, but within a few days thereafter the plaintiff was ordered by the engineer of construction to take up this work and relay it. The court held that under that contract the plaintiff could have stopped work as ordered to do by the engineer of construction and stood upon his contention that the work had been properly done and brought his action to recover the amount due under the contract, and that he also had what the court held was a second remedy, namely, to comply with these improper orders of the commissioners, and then sue the city for the damages sustained by reason of the improper and arbitrary orders received from the commissioners and the engineer of construction which the contractor was compelled to comply with to avoid being a defaulter under a contract with the city, taking what he could get under his final certificate given to him by the engineer and suing the city for the damages sustained by him by compliance with these unjust orders. This, as I understand it, is the view of the learned judge who wrote the opinion of the majority of the Court of Appeals in deciding that case; but I do not think that the facts in this case bring it within the scope of that decision. In this case, the contract between the parties appointed the architect. Before the contract was made he had prepared plans and specifications upon which the contract was to be based. And whether or not the work done under the contract was a compliance with the plans and specifications was a question that the parties stipulated should be determined by the architect thus appointed. The original plans do not show a lining of asphalt between the brick walls which was indicated upon the supplemental plans; and it is upon this that the plaintiff's contention seems to be founded

that he was not required to asphalt this boiler flue. But there is an express clause in the contract that all the walls, where in contact with the excavation, are to be asphalted with pure asphalt from a point "one foot below boiler-room floor to ground level, and to be rendered thoroughly watertight;" and it was also provided that "such details on a large scale or full size as may be necessary to more fully explain the general drawings, will be furnished to the contractor at the proper time during the progress of the work." It was also provided that "the various drawings and this specification are intended to cover a complete and first class job in every respect. Anything omitted in this specification and shown on the drawings, or *vice versa*, is to be done by the contractor without extra charge or expense." The contract thus required this boiler flue to be asphalted, and whether the work that was done complied with these plans and specifications was to be determined by the architect. He determined that the work done by the plaintiff was not in accordance with the plans and specifications, and provided the plaintiff with a detail drawing showing how the work was required to be done so as to comply with the contract, and the plaintiff did that work as required by the architect. It was this work, as thus completed by the plaintiff in compliance with the direction of the architect, that the commissioners accepted and for which he was paid. Upon what principle the plaintiff having accepted that payment can insist that the agents of the city have unjustly and arbitrarily interfered with him in the performance of his contract so as to make the city liable, I am unable to discover.

No case is cited by counsel to sustain such a contention, except the case of *Gearty v. Mayor (supra)*, and that, as I have shown, was upon an entirely different contract and for the performance of different work that did not involve the determination of an expert as to whether or not the plans and specifications had been complied with as in the case of a building such as the one in question. We are not dealing with a case where the city refused to accept the work as complete because the architect had not given a certificate where it was alleged and proved that the work was finished in accordance with the contract, and that the refusal of the architect to give a certificate was unreasonable, as in the case of *MacKnight Flintic Stone Co. v. Mayor* (160 N. Y. 80), but



where the architect had apparently given a certificate for the work done as he had required, where the amount due under such certificate had been paid and where there is no allegation that such certificate was a false certificate and it is not sought to impeach it. It has been settled in many cases in this State that where the parties to a building contract appoint an architect whose decision as to the completion of the work under the contract is to be final, they are concluded by the award of the architect unless it is impeached for fraud, bad faith or manifest error. (*Sweet v. Morrison*, 116 N. Y. 19; *Dwyer v. Board of Education*, 27 App. Div. 87; *affd.* on opinion below, 165 N. Y. 613; *Lawrence v. Mayor*, 29 App. Div. 298; *affd.*, 162 N. Y. 617.)

This latter case seems to be in point. The contract in that case provided that the engineer should in all cases determine the amount or the quantity of the several kinds of work to be paid for under the contract; should determine all the questions in relation to the work and the construction thereof, and in all cases decide every question that might arise relative to the execution of the contract on the part of the contractor, and his decision should be final and conclusive. The engineer under this clause determined that only sixty-four cubic yards of cut stone masonry were to be paid for by the city, and it was held that that award was conclusive under the terms of the contract. Here the architect determined under the contract what the plaintiff was required to do to complete the work contracted for. He furnished plans and specifications for the work, and when the question as to this boiler flue arose he furnished some detail drawings, as the contract provided that he should furnish, and finally the plaintiff accepted those drawings and did the work required under the contract. There is no allegation of bad faith on the part of the architect or the park commissioners, or that this determination was not an honest decision as to the construction of the contract and the work required under it; and it seems to me that there is no basis for a claim that the city or its agents by an unreasonable or an improper action prevented the plaintiff from completing his contract and thus rendered the city liable for damages. The other items of damages which the plaintiff claims to recover under this second cause of action were all for work required by the architect to be done to complete the contract, and what

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was said in relation to this boiler flue applies to all of the alleged improper acts of the agents of the city. At most, there is shown a difference of opinion between the contractor and the architect as to the work he was required to perform, and the decision of the architect, the chosen arbiter of the question, in the absence of fraud or bad faith, was binding and conclusive upon the parties, and there is no basis upon which the city can be liable for the act of the architect in determining the question which the contract provided he should determine.

I think, therefore, that the action of the court below in dismissing the complaint at the end of the plaintiff's case was correct and that the judgment appealed from should be affirmed, with costs.

VAN BRUNT, P. J., concurred.

Judgment reversed, new trial ordered, costs to appellant to abide event.

HENRY W. HARDON, as Assignee of THOMAS W. ROBERTSON, for the Benefit of Creditors, Appellant, Impleaded with WILLIAM J. O'BRIEN, as Sheriff of the County of New York, v. WILLIAM P. DIXON and GEORGE B. HOPKINS, Respondents.

*Statute of Limitations—where a note is payable "on demand after date" the statute begins to run the day after its date.*

An action, brought February 16, 1899, to recover upon a promissory note dated February 16, 1893, payable "on demand after date, \* \* \* with interest at 3% per annum," is not barred by the Statute of Limitations, *first*, because the note did not become due or payable until the day after its date; and, *second*, because if the note did mature on the day of its date the makers had all of that day in which to make payment and the cause of action did not accrue until the next day.

PATTERSON and INGRAHAM, JJ., dissented.

APPEAL by the plaintiff, Henry W. Hardon, as assignee of Thomas W. Robertson, for the benefit of creditors, from a judgment of the Supreme Court in favor of the defendants, entered in the office of the clerk of the county of New York on the 14th day of May, 1902,

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upon the dismissal of the complaint by direction of the court after a trial at the New York Trial Term.

*Treadwell Cleveland*, for the appellant.

*Jabish Holmes, Jr.*, for the respondents.

LAUGHLIN, J. :

The complaint sets forth three causes of action on promissory notes against the defendants as makers. The defendants plead, among other things, the Statute of Limitations. The plaintiffs were nonsuited at the close of their evidence. The only question presented on the appeal is, whether the Statute of Limitations has run against the note on which the third cause of action is based. This note, omitting the signatures of the makers, is as follows :

"§ ———.

N. Y., *Feb. 16th*, 1893.

"On demand, after date, we promise to pay to the order of Ongley Electric Co. twelve thousand five hundred dollars, at 1 Broadway, New York, with interest at 3% per annum."

The action was commenced on the 16th day of February, 1899. The precise question is whether the Statute of Limitations commenced to run *on the date* of this note. If so, the action is barred (*Aultman & Taylor Co. v. Syme*, 163 N. Y. 54); otherwise not.

We think that the Statute of Limitations had not run against this note and that the judgment must be reversed for two reasons: *First*. By the express terms of the note it did not become due or payable until the day after its date. Some force and effect should be given to the words "after date." In the case of *Crim v. Starkweather* (88 N. Y. 339) the Court of Appeals say that a note payable "on demand after date, \* \* \* with interest at the rate of ten per cent per annum after maturity," does not become due until the day following its date. That was an action against an indorser, and the question under consideration was whether payment of the note had been seasonably demanded and notice of dishonor given to the indorser, and, doubtless, owing to the great delay, it was not absolutely necessary for the court to decide the precise day of maturity, but it tends to support what we deem the proper construction of the contract. It will be observed that that note drew interest only after maturity. It was held that the note did not and could

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not mature until the day after its date. This ruling was, as we understand it, based upon the presence in the note of the words "after date." It is stated in the opinion that the only effect of the words "with interest at the rate of ten per cent per annum after maturity," was to fix the rate of interest, because it would draw interest after maturity without such a clause.

*Second.* Even if the note did mature on the day of its date, the makers had all of that day in which to make payment, and the plaintiff's cause of action did not accrue until the next day. (*Continental National Bank v. Townsend*, 87 N. Y. 8, and cases cited.) Of course, the Statute of Limitations could not commence to run before the cause of action accrued. There are many opinions in the courts of our State in which it is stated that a cause of action accrues and the Statute of Limitations commences to run "from" or "at," and one (*Bartholomew v. Seaman*, 25 Hun, 619) "on" the date of a demand note; but in none was this essential to the decision, for the Statute of Limitations had run in every instance, whether the cause of action accrued on the date of the note or on the day after its date.

It follows, therefore, that the judgment should be reversed and a new trial granted, with costs to appellant to abide the event.

VAN BRUNT, P. J., and HATCH, J., concurred; PATTERSON and INGRAHAM, JJ., dissented.

PATTERSON, J. (dissenting):

This action was brought upon three promissory notes made by the defendants to the order of the Ongley Electric Company. They were for \$12,500 each, with interest at three per cent per annum. One was dated December 19, 1892, another January 17, 1893, and the third was dated February 16, 1893. The first and second notes were drawn payable "on demand." The third was drawn payable "On demand, after date." They were not indorsed, but if an action is maintainable upon them at all, the right of the plaintiff to sue is not questioned on this appeal. On the trial the complaint was dismissed as to all of the notes, on the ground that the right of action was barred by the Statute of Limitations. The plaintiff acquiesces in that disposition of the case as to the first and second notes, but contends that the ruling of the trial court was erroneous as to the third note. The action was begun on the 16th of February,

1899. The defendant insists that on that day the Statute of Limitations had run against this note; that the words "after date," following the words "on demand," did not vary those preceding words, and that the legal construction to be given to the note is precisely the same as if these words "after date" did not appear in the instrument.

It is not controverted that as to a note payable on demand the Statute of Limitations commences to run in favor of the maker at its date, and that the expiration of six years from such date constitutes a bar to an action thereon. (*Shutts v. Fingar*, 100 N. Y. 542; *Herrick v. Woolverton*, 41 id. 581; *Wheeler v. Warner*, 47 id. 519; *Parker v. Stroud*, 98 id. 379.) That the note draws interest does not seem to vary the rule. (*Norton v. Ellam*, 2 M. & W. 463; *Wheeler v. Warner*, *supra*; *Mills v. Davis*, 113 N. Y. 243.) The authorities hold that a note payable on demand after date has the same legal effect as one made simply payable on demand. (*O'Neil v. Magner*, 81 Cal. 631; *Fenno v. Gay*, 146 Mass. 118; *Hitchings v. Edmonds*, 132 id. 338.) That is stated as the law in Daniel on Negotiable Instruments (4th ed. § 1215). In section 89 of that work the writer also says: "A note payable \* \* \* on demand after date \* \* \* is not distinguishable from one payable on demand."

It is claimed, however, by the appellant that that rule does not apply in the State of New York, but that a contrary doctrine has been announced in *Crim v. Starkweather* (88 N. Y. 339). That was an action against the indorser of a promissory note payable "on demand after date" at a specified place, "with interest \* \* \* after maturity." The note was indorsed and transferred by the payee on the day of its date. The subject of the application of the Statute of Limitations in a suit *against the maker* of the note was not involved, and was neither discussed nor adverted to, nor were any of the authorities on that subject mentioned. It was regarded as a case falling "within the principle of the general rule which requires a note payable on demand to be presented within a reasonable time in order to charge an indorser." It is not to be denied that there are expressions in the opinion in that case which, considered without regard to the real question there involved, would give support to the contention of the present appellant; but I do not think it is

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controlling as an authority that all promissory notes payable "on demand after date" become time, instead of demand notes.

The judgment should be affirmed, with costs.

INGRAHAM, J., concurred.

Judgment reversed, new trial ordered, costs to appellant to abide event.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. MOSES ABRAMS,  
Respondent, v. FRANK W. FOX, Warden of the Workhouse,  
Appellant.

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*Conviction for vagrancy in the boroughs of Manhattan and the Bronx — constitutionality of the provisions for the prisoner's earlier discharge, in case of his not having been previously convicted.*

Sections 707-712 of the Greater New York charter, as amended by chapter 486 of the Laws of 1901, provide that persons convicted of vagrancy in the boroughs of Manhattan and the Bronx shall be sentenced to the workhouse on Blackwell's Island for a term of six months, but that if it is the prisoner's first offense within a period of two years the commissioner of correction shall make an order directing that he be discharged at the expiration of five days; that if it is his second offense within that time he shall be discharged at the expiration of twenty days, and that if he shall have been previously convicted two or more times within that period the order shall direct his discharge "at the expiration of a period equal to twice the term of his detention under the last previous commitment, but not in any event exceeding the period fixed by the warrant of commitment."

The sections further provide that the prisoner may, if he so desires, obtain a hearing before a magistrate upon the question whether he has been previously convicted, and also that no prisoner committed upon conviction of vagrancy shall be discharged before the period fixed by the warrant of commitment without the written consent of the magistrate who committed him.

*Held*, that such sections were constitutional.

APPEAL by the defendant, Frank W. Fox, warden of the workhouse on Blackwell's Island, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 14th day of August, 1902, sustaining a writ of habeas corpus theretofore granted in behalf of the relator and discharging said relator from custody.

*Robert C. Taylor*, for the appellant.

*Alexander Bloch*, for the respondent.

LAUGHLIN, J. :

On the 5th day of May, 1902, the relator was duly arraigned and tried before one of the city magistrates on the charge of being a vagrant; he was convicted and sentenced to the workhouse pursuant to the provisions of sections 707 to 710, inclusive, and 712 of the Greater New York charter (Laws of 1897, chap. 378, as amd. by Laws of 1901, chap. 466), "for the term of six months, unless sooner discharged by due course of law." The proceedings were had in conformity with the statute, and the sole ground upon which the relator was discharged and upon which it is sought to sustain the discharge upon this appeal is that the provisions of these sections of the charter, in so far as they relate to the sentence, term of imprisonment and discharge of persons convicted of vagrancy, are unconstitutional and void.

The original provisions of the corresponding sections of the charter were a substantial re-enactment of chapter 237 of the Laws of 1895, as amended by chapter 886 of the Laws of 1896. The purpose of the Legislature seems to have been to provide that the term of detention of persons convicted of public intoxication, disorderly conduct and vagrancy in the city of New York should depend on whether there has been a previous conviction and on the number of such convictions. Recognizing the difficulty of ascertaining the facts in this regard in the Magistrate's Court at the time of conviction, it was provided originally that the sentence for vagrancy should be "for a term not exceeding six months from the date of such commitment, and the warrant of commitment shall so recite." (Greater New York Charter [1897], § 707.) It then became the duty of the commissioner of correction, within three days after the commitment, to ascertain from the records whether the person so convicted had been previously committed to the workhouse within two years, and to make an order specifying the date upon which he should be discharged. In cases of first convictions within said period of two years it was provided that such order should direct their discharge "at the expiration of five days" from the date of their commitment; in cases of second offenses,

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at the expiration of twenty days, and in cases of two or more previous convictions "at the expiration of a period equal to twice the term" of the detention "under the last previous commitment, but not in any event exceeding six months." In cases of vagrancy this was qualified by another provision to the effect that the order of the commissioner might direct that a person convicted of vagrancy be discharged "at the expiration of a period to be fixed" by him and stated therein, "not exceeding six months and not less than the period of detention" above specified for first and subsequent commitments as the case might be. (Greater New York Charter [1897], § 710.) Section 711 provided that where the "period of detention as fixed by the commissioner shall exceed twenty days and shall be less than one hundred and sixty days, the magistrate who signed the last warrant of commitment may, after the expiration of twenty days, direct the discharge of any person so committed."

Sentences under these provisions were declared unconstitutional on the ground that the sentence "for a term not exceeding six months" was too indefinite and that the term of sentence was, in effect, left to the commissioner of correction to prescribe by an order concerning which the prisoner was given no hearing or opportunity to be heard. (*Matter of Kenny*, 23 Misc. Rep. 9; *affd.*, *sub. nom. People ex rel. Kenny v. Creamer*, 30 App. Div. 624.) The Legislature, still recognizing the difficulty of ascertaining the facts with reference to the previous conviction at the time of imposing sentence, and still deeming that the term of imprisonment should depend on the prisoner's previous record, attempted by amendments to these sections to obviate the constitutional objections thereto pointed out by the decision in the *Kenny* case. It is provided in section 707 of the Greater New York charter of 1901 that all persons convicted of vagrancy, with certain exceptions not material to be considered, in the boroughs of Manhattan and the Bronx should be sentenced to the workhouse on Blackwell's island "for the term of six months." The conviction and sentence of the relator were under this statute.

It is made the duty of the superintendent of the workhouse under section 708 of the charter of 1901 — and this provision is the same as that contained in the charter of 1897 — to transmit to the commissioner of correction within twenty-four hours after the com-



mitment of any person to the workhouse as a vagrant "a written statement showing the name, sex, age, residence, occupation, height, weight and the color of the hair of any such person and describing any scars, marks or deformities or other signs whereby such person may subsequently be identified, the date of the commitment, the offense for which such person was committed, and the name of the magistrate by whom the commitment was made." It is also the duty of such superintendent "to ascertain from the records" and "from examination and inspection of the person committed" whether the prisoner has been previously committed to the workhouse on a conviction of public intoxication, disorderly conduct or vagrancy within two years and to show the fact, stating the number of such convictions, the date of the last previous commitment, the name of the magistrate by whom and the offense for which the last previous commitment was made and the period of detention thereunder, in the statement which he is required to transmit to the commissioner of correction within twenty-four hours after the commitment. Section 709 requires the commissioner to record in books of record to be kept in his office, the contents of all reports thus made to him by the superintendent of the workhouse. By section 710 of the charter of 1901 it is made the duty of the commissioner — the same as under the charter of 1897 — to ascertain from these records within three days after the commitment of any person upon a conviction of vagrancy, whether such person has previously been committed to the workhouse within two years upon conviction for public intoxication, disorderly conduct or vagrancy, and to make an order that he be discharged at the expiration of five days from the date of his commitment if it be a first offense; at the expiration of twenty days if it be a second offense, and if there have been two or more previous convictions within such period, "at the expiration of a period equal to twice the term of his detention under the last previous commitment, but not in any event exceeding the period fixed by the warrant of commitment." It is further provided that in case of a person committed upon conviction of vagrancy, no order for his discharge before the period fixed by the warrant of commitment shall be made without the written consent indorsed thereon of the magistrate who committed him. It thus appears that no person convicted of vagrancy could be discharged before serving the full

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term for which he was sentenced unless with the approval of the committing magistrate; and that it was the intention of the Legislature to confine the prisoner, in any event, until the expiration of the fifth day after the date of his imprisonment. Accordingly, where no previous conviction was found there could be no mistake to the prejudice of the prisoner, and the proceedings were entirely *ex parte*. But where the records disclose a previous conviction of a person by the same name and answering the same general description and ascertained *ex parte* and recited in the order of the commissioner to be the prisoner, the warden is required to serve a copy of the order and of section 710 of the charter on the prisoner within twenty-four hours of the making of the order by the commissioner. It is then provided that the prisoner may, if he disputes that he has been previously convicted as recited in the order, within twenty-four hours notify the warden in writing that he claims the date of the discharge named in the order to be erroneous for the reason that he has not in fact previously been convicted upon one or more of the dates specified therein. The warden, upon receiving such notification, is required to cause the prisoner to be taken before the magistrate who last committed him, or, in his absence, before any magistrate sitting in the borough. The prisoner is entitled to twenty-four hours' notice of being taken before the magistrate and to an opportunity to retain counsel and subpoena witnesses. The magistrate is then authorized "to hear and determine" the controverted facts and to modify the order made by the commissioner according to such determination. If the facts recited in the order are found to be true, the court or magistrate is required to make a written finding to that effect, and in consequence of making a false claim and unsuccessfully contesting the question it is provided that the prisoner shall be detained until the expiration of the period fixed in the warrant of commitment.

It is evident that, if the commissioner of correction and the warden or superintendent of the workhouse perform their duties promptly as the Legislature contemplated and if the prisoner so desires, under these provisions he will be given an opportunity to be heard by a court or magistrate on the question as to whether he has been previously committed, as recited in the order made by the commissioner, before the expiration of the fifth day from the date of his

commitment. In that event, if he should be successful in his contention that he had not been previously convicted for any of the offenses within the period specified, he could have the order corrected by the time he would have been entitled to be discharged had it recited no previous conviction and directed his discharge at the expiration of the fifth day after his commitment. There can be no question but that it was competent for the Legislature to prescribe a flat sentence of six months for such offenses, but the statute indicates that it was the intention of the Legislature to have the prisoner, after being thus sentenced, discharged at an earlier period, provided the committing magistrate approved thereof, the date of such discharge depending on the question as to whether he had been previously convicted of any of the offenses specified within the period mentioned and how often. The Legislature has emphasized its approval of this system of punishment and has, in effect, declared that, in its wisdom, it is impracticable to determine the facts with reference to the previous conviction at the time of imposing sentence.

If, therefore, the method and agencies it has provided and employed for the purpose of giving the defendant a hearing in case he disputes the fact as found by the commissioner with reference to a previous conviction should result in his detention beyond the fifth day of his commitment, still we think that was within the legislative discretion. All of these provisions for an earlier discharge than that fixed in the warrant of commitment are for the benefit of the prisoner. No substantial right of the prisoner is invaded. The Legislature might have omitted any or all of them. The judicial functions are fully left to the court. The trial, conviction and sentence are unquestionably legal. The law should not be upset because possibly the commissioner may err in ascertaining the fact with reference to a previous conviction of the prisoner or because either he or the warden may not promptly and faithfully discharge the duties which the Legislature has devolved upon them with reference to bringing about an earlier discharge of the prisoner depending upon his previous good record. These provisions neither render the sentence void for uncertainty nor disproportionate to the offense. (*People ex rel. Bradley v. Illinois State Reformatory*, 148 Ill. 413.)

We are of the opinion, therefore, that the constitutional objections to the original law have been fully obviated.

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It follows that the order should be reversed, the proceedings dismissed and the relator remanded to the custody of the warden under the warrant of commitment.

VAN BRUNT, P. J., PATTERSON, O'BRIEN and McLAUGHLIN, JJ., concurred.

Order reversed, proceedings dismissed and relator remanded.

C. ERNEST BAYNE and CLARENCE B. DAVISON, Appellants, v. ANSON  
W. HARD and Others, Respondents.

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*Sale of merchandise on credit — counterclaim existing in favor of the vendor against the vendee, when not enforceable against the assignee of the latter — provision that the "contract is not contingent upon any other and is to be settled between the buyer and the seller" — it has no effect on assignability.*

In an action to recover damages for the refusal of the defendants to deliver certain coffee to the plaintiffs upon demand, it appeared from the complaint that on August 10, 1901, the defendants sold the firm of Jones & Co. a thousand bags of coffee, to be thereafter shipped, on a basis of five and seven-eighths cents per pound for standard No. 7. The coffee was to average in grade about standard No. 7, and any difference either above or below such standard was to be paid or allowed by the buyer or seller, as the case might be.

The contract provided that "this contract is not contingent upon any other and is to be settled between the buyer and seller mentioned herein, without reference as to gradings or otherwise to any other contracts." It also provided that the invoice should date from the time when the coffee should all be in store and that the coffee should be paid for within thirty days from the date of invoice, discount at the rate of eight per cent per annum to be allowed on the basis of ninety-day notes paid in cash before maturity.

The complaint further alleged that on September 28, 1901, Jones & Co. sold the plaintiffs the thousand bags of coffee which they had bought from the defendants; that, with the exception of the price, the terms of the contract between Jones & Co. and the plaintiffs were the same as those of the contract between the defendants and Jones & Co. The coffee arrived in the city of New York on October 7, 1901. On October 23, 1901, the gradings, by which the price of the coffee was to be determined, were completed, and on October 24, 1901, the coffee had all been placed in store.

On October 25, 1901, Jones & Co. made an assignment for the benefit of creditors, and the assignee soon afterwards transferred to the plaintiffs whatever interest Jones & Co. had in the contract with the defendants. On October 30, 1901, the plaintiffs tendered to the defendants a sum of money greater than the pur-

chase price of the coffee under the contract of August 10, 1901, and demanded a delivery of the coffee, but the defendants refused to comply with such demand.

The defendants, acting under subdivision 1 of section 502 of the Code of Civil Procedure, which provides that if the action is founded upon a contract, which has been assigned by the party thereto, a demand existing against the party thereto, at the time of the assignment thereof, must be allowed as a counterclaim to the amount of the plaintiff's demand, if it might have been so allowed against the party while the contract belonged to him, interposed certain counterclaims existing against Jones & Co. based upon differences arising out of gradings had pursuant to other contracts. The demands sought to be counterclaimed did not arise until Jones & Co. had become insolvent.

*Held*, that the counterclaims were demurrable, as the title to the coffee had passed from the defendants to Jones & Co., and from Jones & Co. to the plaintiffs, before the defendants' right to insist upon their demands against Jones & Co. arose;

That, as the contract of August 10, 1901, contemplated the giving of credit for the purchase price, it could not be said that the title to the goods did not pass until they were paid for;

That the provision in the contract between the defendants and Jones & Co., providing, "this contract is not contingent upon any other, and is to be settled between the buyer and seller mentioned herein, without reference as to gradings or otherwise to any other contracts," did not militate against this construction or restrict the assignability of the contract or the right of Jones & Co. to resell the coffee before payment or delivery.

APPEAL by the plaintiffs, C. Ernest Bayne and another, from an interlocutory judgment of the Supreme Court in favor of the defendants, entered in the office of the clerk of the county of New York on the 7th day of June, 1902, upon the decision of the court, rendered after a trial at the New York Special Term, overruling the plaintiffs' demurrer to counterclaims set up in the defendants' answer.

*Howard R. Bayne*, for the appellants.

*Edward B. Whitney*, for the respondents.

PATTERSON, J.:

This appeal is from an interlocutory judgment overruling the plaintiffs' demurrer to counterclaims set up in the defendants' answer. The action was brought to recover damages for the defendants' failure to deliver on demand certain coffee to which the plaintiffs claim they were entitled under contracts of sale mentioned in

the complaint. It is alleged in that pleading that on August 10, 1901, the defendants made an agreement with the firm of Jones & Co., whereby the former sold to the latter 1,000 bags of Santos coffee, to be shipped during August or September, 1901, from Santos, on a basis of five and seven-eighths cents per pound for standard No. 7 of the coffee exchange in the city of New York; such coffee to average in grade about standard No. 7; any difference either above or below such standard to be paid or allowed by the buyer or seller, as the case might be. The invoice was to date from the time when the coffee should *all* be in store, and the coffee was to be paid for within thirty days from date of invoice; discount at the rate of eight per cent per annum, allowed on the basis of ninety days' notes paid in cash before maturity. It is further alleged in the complaint that on September 28, 1901, Jones & Co. made an agreement with the plaintiffs whereby the former sold to the latter the 1,000 bags of Santos coffee, which Jones & Co. had bought from the defendants, as above stated. The price was five and ninety-four one-hundredths cents per pound. In all other respects the terms of the contract between Jones & Co. and the plaintiffs were the same as in the contract between the defendants and Jones & Co. It is further stated in the complaint that on October 7, 1901, the steamer arrived at the city of New York with the coffee on board; that the defendants on the same day notified Jones & Co. of the arrival of the coffee, and still on the same day Jones & Co. notified the plaintiffs of its arrival; that the coffee was all in store on October 24, 1901; that a grading of the coffee was tendered by the defendants to Jones & Co. prior to October 23, 1901, and Jones & Co. tendered the same gradings to the plaintiffs; that the gradings tendered were refused, but an arbitration was had by which such gradings were settled and the price of the coffee became fixed under the contract which the defendants made with Jones & Co.; that on October 25, 1901, Jones & Co. failed and made an assignment for the benefit of creditors to one Swaney, who afterwards transferred what interest remained of Jones & Co. in the contract with the defendants to the plaintiffs. On October 30, 1901, the plaintiffs notified the defendants of the transfer of Swaney, as assignee, to the plaintiffs, and on the same day they tendered to the defendants

a sum of money greater than the purchase price of the coffee under the contract of August 10, 1901, and demanded a delivery of the merchandise, but the defendants refused to deliver it. The defendants, after pleading generally to the cause of action, interposed two counterclaims. They do not seek an affirmative judgment for the amount of these counterclaims, but insist upon their right, under the provisions of subdivision 1 of section 502 of the Code of Civil Procedure, to deduct such amount from the claim of the plaintiffs. Subdivision 1 of that section provides that if the action is founded upon a contract which has been assigned by the party thereto, a demand existing against the party thereto at the time of the assignment thereof must be allowed as a counterclaim to the amount of the plaintiff's demand, if it might have been so allowed against the party while the contract belonged to him. One of the counterclaims is in the nature of a legal and the other of an equitable right to set off, and as against Jones & Co. they might be made available if the title and ownership of the goods had not passed from Jones & Co. to the plaintiffs before the insolvency of Jones & Co. was declared and the general assignment for the benefit of creditors made.

We think this provision of the Code does not apply in this case. The agreements under which both sales were made are peculiar in their provisions. The sales were of merchandise "to arrive." If on the arrival of the steamer named in the contract, the shipment was found apparently not to be up to the exchange standard named in the contract, the seller had the option to substitute spot coffee from other cargoes in accordance with the contract grading and description. The invoice was to date from the time when the coffee was in store. The contract was not to be contingent upon any other contract and was to be settled between the buyer and seller without reference as to gradings or otherwise to any other contracts.

It is very clear that the contract of August 10, 1901, between the defendants and Jones & Co. was an executory contract, as was also that of September 23, 1901, between the plaintiffs and Jones & Co. But it would seem from the allegations of the complaint, taken in connection with the provisions of the August tenth contract which is annexed to the defendants' answer, that the title to the goods passed from the defendants to Jones & Co. as it did from

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Jones & Co. to the plaintiffs before the defendants' right to insist upon their demands against Jones & Co. arose. That right arose out of the insolvency of Jones & Co. and it is so pleaded in the answer. The defendants were not entitled to offset anything under the specific contract of August 10, 1901, with Jones & Co. for, as before stated, it is expressly provided in that contract that it was not contingent upon any other and was to be settled without reference as to gradings or otherwise in any other contracts, and the demands asserted in the counterclaims are for differences in favor of the defendants arising out of gradings in other contracts. The claims of the defendants did not exist against Jones & Co. prior to the assignment because there had been a full appropriation of the merchandise in store and graded to the respective contracts before the assignment was made. The coffee arrived in New York on October 7, 1901; the defendants notified Jones & Co. of its arrival, and on the same day Jones & Co. notified the plaintiffs. The coffee was all in store by October twenty-fourth. On October twenty-third the gradings were taken, and we think under the adjudged cases (*Bradley v. Wheeler*, 44 N. Y. 502; *Sanger v. Waterbury*, 116 id. 371) that it must be held that the title passed from the sellers to the buyers.

We do not construe these contracts as the defendants do, namely, that the title to the goods did not pass until they were paid for. If the contract between the defendants and Jones & Co. were one in the nature of a cash sale, where the money was to be paid before delivery, their contention would prevail; but the terms of sale contemplate a credit, that is, the goods were to be paid for within thirty days from date of the invoice, with a discount at the rate of eight per cent per annum allowed on the basis of ninety days' notes paid in cash before maturity. Nor is there any presumption to be indulged in that the title was not to pass until payment and delivery by reason of the provision in the contract between the defendants and Jones & Co. that "this contract is not contingent upon any other and is to be settled between the buyer and seller mentioned herein, without reference as to gradings or otherwise to any other contracts." We do not regard the words "between the buyer and seller mentioned herein" as restricting in any way the assignability of the contract or the right of Jones & Co. to resell the coffee before



payment or delivery. The provision quoted relates to the separateness of the particular contract from all other contracts, and the intention of the parties that it should be settled without reference to other contracts that might exist between them. It means that the transaction entered into between them by that particular contract is to be an independent one, and the words "between the buyer and seller" add nothing to and take nothing from that provision. There would be quite as much a stipulation to the same effect between the buyer and seller without those words as with them.

We think the demurrer should have been allowed. The interlocutory judgment overruling such demurrer should be reversed, with costs, and judgment directed sustaining the demurrer, with costs in this court and in the court below, and with leave to defendants to amend on payment of all costs.

VAN BRUNT, P. J., INGRAHAM, HATCH and LAUGHLIN, JJ., concurred.

Judgment reversed, with costs, and demurrer sustained, with costs, with leave to defendants to amend on payment of costs in this court and in the court below.

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WILLIAM MCKINLEY, Respondent, v. METROPOLITAN STREET RAILWAY COMPANY, Appellant.

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*Negligence — refusal to charge that "if the plaintiff failed to look for an approaching car and was struck by one as soon as he put one foot upon its track" he was negligent, held to be error — exceptions to a charge, when sufficient.*

In an action to recover damages for personal injuries sustained by the plaintiff in consequence of being struck by one of the defendant's electric cars, while he was crossing a city street, testimony was given tending to show that when the plaintiff was crossing the street he seemed to be unconscious or heedless of his surroundings. The defendant requested the court to charge: "If the plaintiff failed to look for an approaching car and was struck by one as soon as he put one foot upon its track, he was guilty of contributory negligence and the verdict must be for defendant." The court refused to charge as requested, but charged: "Of course, if the plaintiff was *reckless*, failed to look up and down, *heedless* of the consequences, and this car was in sight and he put his foot upon the track, clearly he was guilty of negligence, and the defendant is entitled to your verdict, if you believe that to be the facts established in the case."

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*Held*, that the defendant was entitled to have the court charge as requested, and that the modification of the request constituted error.

At the close of the trial the court, in response to an inquiry made by the defendant's counsel concerning exceptions to the charge and to the refusals to charge, stated, "You may take them after the jury have retired."

After the jury had retired the defendant's counsel said, "Your Honor will allow me an exception in due form to each request which is refused and to each request which was modified," and the court replied, "Yes."

*Held*, that the exception so taken was sufficient to enable the defendant to review the action of the court in modifying a request to charge.

APPEAL by the defendant, the Metropolitan Street Railway Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 2d day of May, 1902, upon the verdict of a jury for \$15,000, and also from an order entered in said clerk's office on the 4th day of June, 1902, denying the defendant's motion for a new trial made upon the minutes.

*Charles F. Brown*, for the appellant.

*Charles G. F. Wahle*, for the respondent.

PATTERSON, J. :

The plaintiff, while attempting to cross from the west to the east side of Sixth avenue, at or near the southerly crosswalk of Forty-first street, in the borough of Manhattan in the city of New York, was struck and seriously injured by an electric car operated by the defendant's servants, on the westerly track of the defendant's road on that avenue. He was walking forward, reached the westerly rail of the track, but was not able to turn or retrace his steps in time to avoid contact with the car. There was evidence to show that the car was proceeding at a very rapid rate of speed and that the motor-man did not sound the gong or give warning as he approached the crosswalk. The plaintiff testified that when he left the sidewalk at the curb he looked up and down; that there was a truck on the westerly track above Forty-first street; that he could see through this truck, which was an open one, and there was no car behind it; that the truck turned into Forty-first street to the west, just as he the plaintiff, was near the track, and the car rushed upon him.

That there was a truck upon the track is conceded, and that it turned out from Sixth avenue into Forty-first street, going west, is also conceded, but it would seem from the situation that the truck on the track concealed from the motorman the presence of the plaintiff upon the street.

Some members of the court, upon the whole evidence, are of the opinion that negligence of the motorman was not satisfactorily proven, but be that as it may, this judgment must be reversed for a very serious error of the court in refusing to give the jury an instruction which the defendant was entitled to have charged. While the plaintiff himself testified to facts which might exonerate him from the imputation of contributory negligence, there were two witnesses whose accounts of his action at the time the accident occurred, if accepted by the jury, would have shown that the plaintiff was negligent or failed to observe due and proper care under the circumstances. One of those witnesses swore that as the plaintiff was approaching the track he was looking straight ahead, and another swore that when he first saw the plaintiff the latter was four or five feet from the westerly rail of the westerly track, with his head slightly bowed, and the attention of this witness was particularly directed to him by the fact that the plaintiff seemed to be either unconscious or heedless of his surroundings or where he was going or what he was approaching, and that he continued to walk east from the west until the collision with the car, and that there was no change in his attitude with respect to his head or the way he was looking. With that evidence in the case, the defendant requested the court to charge the jury that "if the plaintiff failed to look for an approaching car and was struck by one as soon as he put one foot upon its track, he was guilty of contributory negligence and the verdict must be for defendant." The court refused to charge that, but modified it in the following words: "Of course, if the plaintiff was *reckless*, failed to look up and down, *heedless* of the consequences, and this car was in sight and he put his foot upon the track, clearly he was guilty of negligence, and the defendant is entitled to your verdict, if you believe that to be the facts established in the case."

This modification of the request was erroneous. The defendant was entitled to have it charged as requested. *Recklessness* and

heedlessness are not controlling elements. Negligence, not necessarily so gross as to be recklessness, and disregard of consequences was the proper test, and the instruction to the jury failed to present the question accurately and fairly. A witness had testified that the action of the plaintiff was such as to indicate that he was *unconscious* of his situation as well as heedless, and that unconsciousness of his surroundings at the time must have been the result of *inattention*, but does not necessarily imply recklessness of consequences or indifference.

It is suggested, however, that the defendant cannot avail itself of this error because of the insufficiency of the exception taken to the refusal of the court to charge. A great many requests to charge were presented by both sides and they were ruled upon separately. At the conclusion of a colloquy between the court and counsel with reference to the charge and the requests to charge of both sides, counsel for the defendant addressed the court with respect to exceptions, and the court said, "You may take them after the jury have retired; either side may do that." Whereupon the jury retired. Then the defendant's counsel said, "Your Honor will allow me an exception in due form to each request which is refused and to each request which was modified," to which the court responded, "Yes."

An exception so very general, if simply taken and entered upon the record without the acquiescence of the court, might be unavailing. Where the court refused to charge defendant's requests, except as charged, and the defendant's counsel took an exception to the refusal to charge as to each and every one of said requests, the exception was held to be of no avail (*Newall v. Bartlett*, 114 N. Y. 399, 405); so, in *Read v. Nichols* (118 id. 224, 231), a statement made by counsel at the close of the charge that he excepted to the refusal to charge as requested in so far as the court did refuse, and to each of the refusals to charge as requested, was held to be too general to raise any question of law on appeal. And to the same effect is *Huerzeler v. C. C. T. R. R. Co.* (139 N. Y. 493). In *Smedis v. Brooklyn & Rockaway Beach R. R. Co.* (88 N. Y. 14), at the close of the evidence, numerous requests to charge were presented by the defendant's counsel, most of which were charged, and the court declined to charge "except as already charged," and to

that refusal as to each of the requests the counsel excepted. It was held that if the court erred in refusing to charge one or more of the propositions requested, there is no sufficient exception to such refusal. It should have been specific and to have pointed out each particular request to which it was intended to apply. But the rule deducible from those cases cannot be invoked here to deprive the defendant of its right to insist upon the error pointed out in the refusal to give the specific instruction, above referred to, to the jury. The principal office of an exception to a charge or to the refusal of the court to charge is to point out an error, if one exists, so that an opportunity may be afforded to rectify it. Here there is not a mere perfunctory declaration of counsel that he takes a general exception, but by a special application leave was asked to take an exception in a certain form, and it being entirely satisfactory to the court that it should be taken in that form, permission so to do was given. Thereby the trial judge indicated his willingness to have his rulings reviewed on such a general exception, and signified his purpose of making no change or alteration in those rulings, and indicated that he would abide by them.

The judgment and order appealed from should be reversed and a new trial ordered, with costs to appellant to abide the event.

HATCH and LAUGHLIN, JJ., concurred.

INGRAHAM, J. (concurring):

I concur in the reversal of this judgment upon the ground that the plaintiff failed to prove that he was free from contributory negligence. The plaintiff testified that he walked on the crosswalk on the south side of Forty-first street and Sixth avenue; that he saw a truck approaching which at that time was just about the middle of the street turning west into Forty-first street; that he then started to cross the track and as he put his foot over the first rail the car struck him; that as he put his foot upon the track he noticed the car and attempted to turn and jump back; that the car was right on top of him, about four or five feet away when he first noticed it; that his left leg was then over the rail, the right foot not yet over the rail; that turning to jump back he placed his back towards the car and was struck by the car on the right hip. He further testified that he could have seen the car if there had been one coming on the

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track, but that there was no car in sight; that at the time he left the curbstone to cross Sixth avenue he was looking uptown the whole time. This was the evidence of the plaintiff, the principal actor. The fact that the car was within four or five feet of the plaintiff when he attempted to cross the track is conclusive evidence that the car was there. Assuming that the plaintiff looked as he said he did, and could see no car, it must have been hidden by the wagon that was on the track, and if that was so, then it must follow that the view of the plaintiff was hidden from the motorman, as it would have been impossible for the motorman to see the plaintiff if the plaintiff could not see the car upon which the motorman was riding. The plaintiff stood in the street within two feet of the track, and if he had waited but a moment until the wagon was clear of the track the car would necessarily have been in plain sight. The plaintiff, thus standing in a place of safety, attempted to cross the track either without looking after his view up the track was unobstructed by the wagon, or after he had seen the approaching car. In either event he was guilty of contributory negligence.

I think, therefore, the complaint should have been dismissed, and for that reason the judgment should be reversed and a new trial ordered.

VAN BRUNT, P. J., concurred.

Judgment and order reversed, new trial ordered, costs to appellant to abide event.

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GEORGE F. SHRADY, Appellant, v. ANNA B. VAN KIRK and Others,  
Respondents, Impleaded with Others.

*Will—provision directing a sale—presumption when it does not provide for taking back a bond and mortgage—reference to hear and determine—the court cannot direct that a judgment entered upon the referee's report shall contain a provision, not authorized thereby, that a part of the proceeds of a sale may be secured by a bond and mortgage—remedy where such a provision is inserted.*

A will, which directed the testamentary trustees to sell the testator's realty, was silent as to whether the sale should be made wholly for cash or partly on bond and mortgage. In an action brought by a beneficiary under the will to compel the sale of the real estate and to obtain other relief, the issues were referred to

a referee to hear and determine. The referee filed a report directing a sale of the realty, but did not specify whether the sale should be made for cash or on credit. After the filing of the referee's report the referee approved, as to form, a judgment which recited that the realty should be sold in separate parcels "with the privilege of allowing sixty per cent of the purchase money to remain on bond and mortgage for two years." Thereafter the court at Special Term directed the entry of a judgment in conformity with that approved by the referee. The plaintiff then moved to correct the judgment by striking therefrom the provision that sixty per cent of the purchase money might remain on bond and mortgage for two years.

Upon an appeal from an order denying such motion, it was

*Held*, that the referee was *functus officio* when he approved, as to form, the proposed judgment submitted to him;

That the failure of the will to authorize a sale on bond and mortgage raised a presumption that it was the intention of the testator that the property should be sold for cash;

That, as the referee in his report had simply directed a sale of the real estate and thus followed practically the language of the will, it would be presumed that it was his view that the sale should be made solely for cash;

That the court had no power to insert the provision that a portion of the purchase money should remain on bond and mortgage for two years, as such provision was substantially different from that prescribed in the referee's report;

That the practice adopted by the plaintiff for the correction of the judgment was regular, and that he was not obliged to seek relief by an appeal from the judgment.

VAN BRUNT, P. J., dissented.

APPEAL by the plaintiff, George F. Shradly, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 14th day of April, 1902, denying the plaintiff's motion to correct a judgment theretofore entered in the action upon the report of a referee, because of certain alleged irregularities.

The action was brought by a beneficiary under the will of Maria Shradly, deceased, to compel the sale of a large amount of realty, for the removal of trustees, a settlement of their accounts, and other relief. The issues in the action were referred to a referee to hear and determine. His report was made on October 10, 1901, and filed in the office of the clerk on November 6, 1901. That report directed that the testamentary trustees should sell all such realty at public auction, but whether for cash, on bond and mortgage, on credit, or otherwise than cash, did not appear in such report. Subsequently upon notice, the referee, on January 11, 1902,

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approved a judgment as to form, wherein it was provided that such real estate should be sold in separate parcels, "with the privilege of allowing sixty per cent of the purchase money to remain on bond and mortgage for two years." A motion was then made to confirm the report of the referee and for entry of judgment, and the court at Special Term directed the entry of judgment in conformity with the form of judgment approved by the referee which contained the provision quoted, that upon the sale of the property sixty per cent of the purchase money should remain on bond and mortgage for two years. Thereafter plaintiff moved to strike out this and three other provisions in the judgment, upon the ground that they were unauthorized and irregularly and improperly inserted, which motion was denied, and from the order so entered the plaintiff appeals.

*Barclay E. V. McCarty*, for the appellant.

*S. B. Brownell*, for the respondents Archibald M. Shradly and others.

*Louis F. Doyle*, for the respondent Van Kirk.

*Jacob Shradly*, for the respondents John and Jacob Shradly.

O'BRIEN, J.:

The principal question for our consideration is as to the right and power of the Special Term, after a reference to hear and determine, to insert the provision permitting the sales upon bond and mortgage. Incidentally the question of practice arises as to whether such a provision, if improperly inserted, can be stricken out on motion as an irregularity, or whether the plaintiff's remedy is not by appeal from the judgment. While the case was pending and the referee had jurisdiction over the action, he had the right, in connection with the making of his report and decision, to settle the form of the judgment, but after the report had been taken up and filed, the referee was *functus officio* and had no further jurisdiction for the purpose of deciding any issue involved in the action. If we are right in this view we are not aided in our consideration of the main question by the approval of the referee, two months after his report was filed, as to the form of the judgment, but must view the



question precisely as though the referee, having the right to determine such form, had neglected to do so.

The question, therefore, narrows down to whether, upon the motion to confirm the report and settle the form of judgment, the court had the power to insert the provision allowing sales on bond and mortgage.

In *Vagen v. Birngruber* (9 N. Y. St. Repr. 729) it was said, "the action being for equitable relief, the final judgment should have been a decree of the court, settled by the court, and entered upon its direction, the referee who tried the cause not having reported the form of a decree to be entered. Section 1228 of the Code in no way conflicts with this practice." Here, however, the sales were to be made by testamentary trustees, and, therefore, necessarily under the provisions of the will; and the will directed a sale of the realty, but was silent as to whether it was to be sold entirely for cash or on credit, or otherwise than for cash. This being the situation, we think the general rule is applicable, that the failure to authorize a sale on bond and mortgage raises the presumption of an intention that the property should be sold for cash. Where a testamentary disposition has been made directing the sale of realty, the invariable rule is that the sale shall be absolutely for cash, unless otherwise distinctly specified, and not for bond and mortgage nor on any credit plan.

Whether this question was considered by the referee is not made to appear, further than that his report does not in terms do more than direct a sale of the realty, thus following practically the language of the will; and, seemingly, therefore, the presumption would follow that in his view the sale should be solely for cash. When the motion was made to the court, therefore, we think it was without power or right to insert the provision essentially different from this, and allowing the sale upon terms permitting the purchaser to give a bond and mortgage for sixty per cent of the purchase price. As said in *Paget v. Melcher* (26 App. Div. 15): "The action was referred to a referee to hear and determine, and his report was made directing the judgment to be entered. In that case the report stands as the decision of the court (Code Civ. Proc. § 1228), and by the provisions of that section the clerk was required to enter judgment upon it when its form has been settled by the referee.

Although it has been deemed necessary in this department that there should be a direction of the court for the entry of the judgment, yet when entered it must be the one directed in the report of the referee; and the court at Special Term, when a motion is made for leave to enter the judgment, has no power or authority to give directions which shall require the entry of a judgment substantially different from that prescribed in the report of the referee. (*Kennedy v. McKone*, No. 2, 10 App. Div. 97.) The judgment to be entered upon this report is to be reviewed in the same way as one entered upon a decision of the court, for the report has the same effect precisely as such decision. The manner in which it is to be reviewed is prescribed in section 1022 of the Code, and no authority is given to the court at Special Term to change or alter the directions given by the referee as to the entry of judgment. The application for judgment upon the report which is made to the court at Special Term is not for the purpose of a review of the correctness of the findings of the referee, but simply to furnish an assurance of regularity in the manner of entering the judgment and to enable all parties to know that the judgment as entered conforms to the one directed in the report. There was, therefore, no authority in the Special Term to modify the conclusions of law found by the referee so as to enter a different judgment than that directed in the report."

We have already adverted to the fact that the referee, after he ceased to have control over the action, was of opinion, as appears from his approval of such provision in the form of judgment, that it should be inserted; but this does not aid us, because, as stated, when he expressed such approval he was *functus officio*, and, therefore, it is as though he had not attempted to exercise that power. It was the duty of the referee to decide every material question involved in the litigation, and he had no power to relegate or return any such question for decision to the court. The question as to whether under the terms of the will the property could be sold otherwise than for cash, involving as it did a construction of that instrument, was a material one; and it needs no argument to support the view that the referee could not refuse to pass upon such a question and then refer it back to the court. There is certainly no provision of law which gives a referee the right to confer

jurisdiction on the court to dispose of some untried question which was before him on the reference to hear and determine. It was his duty to try and dispose, as we have said, of all the material questions; and upon the return of his report to the court, all that remained was for the court to settle the form of the judgment accordingly. This, however, gave no power to the court to add to or take away from the judgment in a material respect, and the attempt to do so is a clear irregularity.

We have thus reached the conclusion that the court exceeded its power in inserting any such provision in the judgment. The question remains, however, whether the practice pursued by the plaintiff was right in moving to strike out the provision as irregular, or whether his sole remedy was by appeal from the judgment. Under the authorities to which we have adverted, we think the practice followed was right. As said in *Corn Exchange Bank v. Blye* (119 N. Y. 414): "We think the decisions are uniformly to the effect that when an error has been made in respect to the form of the judgment by which its scope or amount has been enlarged or increased beyond that plainly authorized by a verdict, referee's report or decision of a court, a question is not presented for the consideration of the court on appeal; but the error must be corrected if at all, by motion in the court of original jurisdiction." It follows accordingly that the order appealed from should in this respect be reversed.

In regard to the three other alleged irregularities we need add nothing to what was said by the learned judge in disposing of the motion at Special Term.

The order appealed from should accordingly be reversed, and the motion granted to the extent indicated, and in all other respects affirmed, without costs to either party on this appeal.

MCLAUGHLIN and LAUGHLIN, JJ., concurred; VAN BRUNT, P. J., dissented.

Order reversed and motion granted to extent stated in opinion; in all other respects affirmed, without costs to either party.

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HENRY PARISH, Individually, and as Executor, etc., of DANIEL PARISH, Deceased, and Others, Respondents, v. SUSAN DELAFIELD PARISH and Others, Defendants.

JACOB ROTHSCHILD, Appellant.

*Purchaser under a judgment in partition — relieved from his purchase where guardians ad litem for infant defendants were connected in business with the attorneys for adverse parties — who is an "adverse party."*

Rule 49 of the General Rules of Practice, which provides, "No person shall be appointed guardian *ad litem*" unless he "has no interest adverse to that of the infant, and is not connected in business with the attorney or counsel of the adverse party," should be construed in its broadest sense, and when so construed the term "connected in business" with the attorney or counsel of the adverse party contemplates any kind of business association and includes clerks as well as partners.

The terms "interest adverse" and "adverse party" should receive a similar construction, and the rule should not be limited to cases wherein it has been adjudged that the interests of the infant are or are not adverse, but should be applied as well to cases in which that question is involved.

In an action to partition real property passing under the 8d paragraph of the will of Daniel Parish it appeared that the testator devised the property to his two daughters, Susan D. Parish and Helen Parish, for life, and directed that after the termination of such life interest the property should be sold by his executors and the proceeds be divided equally among his children then living (excepting one son) and the issue, if any, of such as should have died, the issue of any deceased child taking their parent's share *per stirpes*. At the end of such paragraph was a statement that the testator desired his daughters to be able to maintain their usual style of living, and it was under this provision that the action was sought to be maintained.

Certain infant great grandchildren of the testator, whose interests depended upon the death of their grandfather or grandmother, as the case might be, prior to the death of the survivor of the two life tenants, were made parties to the action. The attorney for the plaintiffs was a clerk in the office of a firm of lawyers who appeared for the adult defendants, and a member of this firm appeared for some of the infant defendants, while another clerk in their office appeared for other infant defendants. The questions litigated in the action included the construction of the will, the right to maintain the action and the time of the sale.

*Held*, that the infant defendants were necessary parties to the action and were entitled to be represented by guardians *ad litem* who were in no way connected in business with the attorney for parties who had rights which were or might be adverse to those of the infants;

That, as the infants had not been represented by proper guardians *ad litem*, the purchaser at the partition sale was entitled to be relieved from his purchase, notwithstanding that it appeared from the terms of the judgment that, even if the infants had been represented by proper guardians *ad litem*, the infants could not have changed the judgment rendered or have prevented the sale from taking place.

APPEAL by Jacob Rothschild, the purchaser at a partition sale had in the above-entitled action, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 28th day of August, 1902, denying the appellant's application to be relieved from his purchase.

The sale was made in pursuance of an interlocutory judgment in the usual form. At the time appointed for the closing the bidder declined to take title upon the ground that it is not marketable. The property in question was part of the estate of Daniel Parish, deceased, who, by the 3d paragraph of his will, devised the same to his two daughters, Susan D. Parish and Helen Parish, for life, and directed that, after the termination of such life interests, the property should be sold by his executors and the proceeds divided equally among his children then living (excepting one son), and the issue, if any, of such as might have died, share and share alike, the issue of any deceased child taking the share the parent would have taken if alive, *per stirpes*. At the end of said 3d paragraph is the statement by the testator of his intention that he desires his daughters to be able to maintain their usual manner of living.

Construing this paragraph, the referee on title has found — and this has been confirmed by the interlocutory judgment — that apart from the interests of the life tenants, the share or interest of each of the other parties to the action is in the proceeds of the sale of the property and not in the real estate. Guardians *ad litem* were appointed to represent the several infant defendants, who are all great grandchildren of the testator, and whose interests depend upon the death of a grandfather or grandmother, as the case may be, prior to the death of the survivor of the two life tenants.

The attorney for the plaintiffs was a clerk in the office of a firm of lawyers who appeared for the adult defendants; and a member of this firm appeared for some of the infant defendants, while

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another clerk in their office appeared for others of the infant defendants. One of the objections made by the purchaser on the sale was that rule 49 of the General Rules of Practice has been violated in the appointments made of the guardians *ad litem*, which rule, so far as applicable provides: "No person shall be appointed guardian *ad litem*, either on the application of the infant or otherwise," unless he has certain qualifications, "and has no interest adverse to that of the infant, and is not connected in business with the attorney or counsel of the adverse party."

This objection, with others, was overruled, and the application of the purchaser to be relieved from his purchase was denied, and from the order thereupon entered he appeals.

*John J. Crawford*, for the appellant.

*Edward C. Parish*, for the respondents.

O'BRIEN, J. :

Rule 49 of the General Rules of Practice, having for its object the protection of infants, must, so far as its language is susceptible of extension, be construed in its broadest sense; and so construed, we think the term "connected in business" with the attorney or counsel of the adverse party, contemplates any kind of business association and, therefore, would include clerks as well as partners. What the rule was intended to secure is the appointment of a guardian who has no business association with those representing adverse interests, so that the infant might obtain the benefit of the free and independent judgment of the one selected to protect his rights. A similar construction, we also think, must be given to the expressions in the rule, "interest adverse" and "adverse party." So construed, the rule is not to be limited to cases wherein, as the result of an adjudication, it has been held that the interests of the infant are or are not adverse; but is applicable as well to cases where the question of whether the interests of the infant are or are not adverse is involved.

Applying the rule as thus construed to the facts here, we may agree, for the sake of argument, with the respondents in holding that, as the judgment has determined that the infants could not prevent a sale, the right to enforce which was granted by section

1532 of the Code of Civil Procedure, therefore, the infants had no interest in the property itself as such, but only in the proceeds of the sale. Yet, granting all this, we think that the infants were entitled to be represented by guardians who were in no sense related in business to the counsel or party whose effort was directed to bringing about at this time the sale of the property.

That such a sale was an advantage to the life tenants is easy to infer from the character of the property, which in its present condition could not be readily rented so as to produce an income equal to that which could be secured by obtaining the value of the land and investing the same in some other form. And it is only because of the construction of the 3d paragraph of the will, wherein support is found for the contention that the life tenants are entitled to deal with the property so as to enable them to maintain their usual manner of living, that they had the right to elect to change the form of the trust fund and, by so doing, destroy the outstanding power of sale, which, under the terms of the will, was not to be exercised by the executors until the termination of the life estates. The questions, therefore, which were involved in their right to maintain this suit in partition included not alone a construction of the will, but also of section 1532 of the Code of Civil Procedure.

In a partition suit, so brought, we think it clear that not only the adults, but those infants who were represented by guardians, were both proper and necessary parties. In other words, in order to determine and cut off their rights and to conclude them upon the election which the plaintiffs made by bringing this action, it was necessary that they should be parties. Although it is true that the infants were not to take the property itself, but only an interest in the proceeds when it was sold, if they survived those entitled to receive the same at the date of distribution, still the question of the time of sale in addition to the other questions was important. While the present sale was of advantage to the life tenants, it might be a disadvantage to the remaindermen, considering the situation of the property, which, if retained, might greatly enhance in value and be worth much more than it now is, if sold hereafter upon the death of the last surviving life tenant. They may have been powerless to prevent such sale at this time, but on the question of whether or not it should now take place they were entitled to be heard.

The questions, therefore, of the construction of the will, of the right to maintain the action, and of the time of the sale, were involved; and though it be concluded that upon all these the infants could not have changed the judgment rendered, or have prevented the sale from taking place, still, as necessary parties, they were entitled to be heard upon these questions, and the attitude which they would in all probability have assumed would be in hostility to a sale at the present time. Thus, having a right to their day in court and the right to be heard upon the questions involved, even though it may be concluded, which it is unnecessary for us to determine, that they could not make any effective resistance to the sale at this time, they were entitled to appear, and the rule required that they should, upon such a hearing, be represented and have the judgment and advice of a guardian in no way connected in business with the attorney for parties who had rights which were or might be adverse in any way to theirs.

If it be conceded, as we think it must, that the conduct of the plaintiffs in forcing a sale of the property at this time was to the advantage of the life tenants and likely to result in injury to the remaindermen, and if further there was presented a question upon which the infants were entitled to be heard as necessary parties, it follows, we think, regardless of whether they could or could not eventually succeed in maintaining their position, that they were entitled to their day in court, and entitled to be represented by guardians who had no connection in business with those who were concerned in maintaining an adverse position.

The fact that the judgment rendered, if affirmed, shows that they could not prevent the sale and could not have changed the judgment, we regard as immaterial upon the question which we are called upon to decide, because, if in an action in which a judgment is rendered one is a necessary party and entitled to be heard, he cannot be deprived of those rights, even though it be concluded that the result without his presence and without a hearing would be precisely the same.

Undoubtedly, the conduct of those who applied for the appointment of the guardians, as well as their consenting to act, was affected by the opinion they entertained that the interests of the infants could not be adverse because they would be unable to prevent at this time



a sale of the property, and this opinion has been sustained by the judgment which has been entered in the action. All this, however, as we have endeavored to point out, is but begging the real question, which turns not upon what may ultimately be decided as to the infants' rights, but upon whether or not they were necessary parties, entitled to be heard in an action in which their rights and those who brought them into court are not identical.

Where, therefore, as here, the interests of the life tenants and the interests of the infants as contingent remaindermen are likely to conflict, and an action is brought in which those conflicting interests are involved and to which the infants are necessary parties, we find no avenue of escape from the conclusion that, unless the infants are represented by guardians who possess the necessary qualifications and are free from the objections stated in the rule, the situation is the same as though no guardian had been appointed and no hearing had in their behalf. The judgment thus being voidable as to some of the infant defendants, for the reason that they were not represented by duly qualified guardians *ad litem*, it follows that this objection of the purchaser is good, and that he is entitled to be relieved from his bid.

We think that the order appealed from must accordingly be reversed, with ten dollars costs and disbursements, and the application of the purchaser to be relieved granted, with ten dollars costs.

VAN BRUNT, P. J., PATTERSON, McLAUGHLIN and LAUGHLIN, JJ., concurred.

Order reversed, with ten dollars costs and disbursements, and motion granted, with ten dollars costs.

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NICOLAS CHAPUIS, Appellant, v. WALTER P. LONG, Respondent.

*Interpleader — when no sufficient basis is shown therefor — reading in support of a motion an affidavit not served on the adverse party.*

A temporary receiver in bankruptcy having come into possession of a policy of insurance on the life of the bankrupt, the court appointing him made an order directing him to deliver the policy to one Chapuis, and providing that upon compliance with the order the receiver should be discharged from liability in respect to the order. The receiver refused to comply with the order,

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and Chapuis brought an action in replevin against him to recover possession of the policy. The receiver then made a motion to substitute one Parkhurst as defendant in the replevin action, alleging "that one Arthur H. Parkhurst, not a party to this action, made a demand against deponent for the same property, without collusion with this deponent; that the said Parkhurst claims the said property by virtue of an order made in the City Court of the city of New York, wherein and whereby the said Arthur H. Parkhurst was appointed receiver of the property, assets and effects of one Isidore Marty, and that the said Arthur H. Parkhurst, as deponent is informed and verily believes, has qualified as such receiver and claims the said policy of insurance as the property of the said Isidore Marty, and he claims to be entitled to the same by reason of such receivership." No facts were stated tending to show that Parkhurst's claim had any just or reasonable foundation.

*Held*, that the order of interpleader should have been denied.

The practice of receiving, in support of a motion, affidavits which have not been served upon the opposing party and which he has had no opportunity of answering is bad and should not be encouraged.

APPEAL by the plaintiff, Nicolas Chapuis, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 9th day of September, 1902, substituting one Arthur H. Parkhurst as defendant in the place of Walter P. Long, and also from an order made at the New York Special Term and entered in said clerk's office on the 4th day of October, 1902, resettling the first above-mentioned order and substituting Arthur H. Parkhurst, as receiver of the property and effects of Isidore Marty, a judgment debtor in supplementary proceedings, as defendant in the action in the place and stead of the said Walter P. Long.

*Arthur Furber*, for the appellant.

*A. H. Parkhurst*, for the respondent.

O'BRIEN, J.:

The defendant moved upon an affidavit and the summons and complaint in this action for an order of interpleader. By the complaint it appeared that this is an action in replevin to obtain the possession of a policy of insurance on the life of one Isidore Marty. The defendant came into possession of this policy by virtue of his appointment as temporary receiver in bankruptcy of the estate of Isidore and Marguerite C. Marty, by the District Court of the United

States for the Southern District of New York. The said court, by an order duly made, directed its receiver (the defendant) to turn over the policy to this plaintiff, discharging him from all liability with respect thereto, upon compliance with that order.

The material part of the affidavit used by the defendant on the motion recites "that one Arthur H. Parkhurst, not a party to this action, made a demand against deponent for the same property, without collusion with this deponent; that the said Parkhurst claims the said property by virtue of an order made in the City Court of the city of New York, wherein and whereby the said Arthur H. Parkhurst was appointed receiver of the property, assets and effects of one Isidore Marty, and that the said Arthur H. Parkhurst, as deponent is informed and verily believes, has qualified as such receiver and claims the said policy of insurance as the property of the said Isidore Marty, and he claims to be entitled to the same by reason of such receivership."

Upon the argument of the motion an affidavit was permitted to be read in support thereof which had not been served on the plaintiff, and was not one of the papers upon which the order to show cause was granted. This affidavit was made by the attorney of a judgment creditor of Isidore Marty, and therein he refers to the proceedings in the City Court from which it appears that, after the obtaining of judgment, supplementary proceedings were instituted resulting in an order which contained an injunction restraining Long from making any disposition of the policy. Against the objection of the plaintiff this affidavit was received and considered on the motion.

We have on several occasions lately called attention to this practice, which we think is bad and should not be encouraged, of permitting in support of a motion affidavits to be read and received which have not been served and which the person against whom they are used has had no opportunity of answering. (*Poillon v. Poillon*, 75 App. Div. 536; *Matter of Spofford Avenue*, 76 id. 90.)

Not only, however, upon the practice followed, but also upon the merits, we think this order must be reversed. It will be noticed that the original affidavit, even if we regard it as supplemented by the objectionable one permitted to be used upon the motion, is a mere naked allegation of adverse claim without any statement of

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facts tending to show that such claim has any just or reasonable foundation to support it, or that defendant is unable to determine, without hazard to himself, to whom he can safely deliver the policy in question. The rule is well established that a plaintiff has a right to select the defendant whom he desires to sue, and however reluctant the latter may be to remain in the action, he has no right without good cause shown to apply to the court and, against the plaintiff's protest, have another and different defendant substituted in his stead.

Undoubtedly where good grounds are stated, requiring such substitution or necessitating that there should be an interpleader in the action, the court has power, but only upon a showing that it is necessary, to substitute in place of the one selected by the plaintiff, another and different party defendant. The essentials required for an order of interpleader have been many times stated. (See *Nassau Bank v. Yandes*, 44 Hun, 55; *Stevenson v. N. Y. Life Ins. Co.*, 10 App. Div. 233; *Wells v. National City Bank*, 40 id. 498; *Steiner v. East River Savings Inst.*, 60 id. 232; *Lateer v. Prudential Ins. Co.*, 64 id. 423.) In the *Nassau Bank Case* (*supra*) the court held that it cannot be said that all it is necessary to establish in order to justify an interpleader is that some claim had been presented, but "it is necessary, in addition, to prove that such claim had some reasonable foundation and that there was some reasonable doubt as to whether the stakeholder would be reasonably safe in the payment over of the money."

Here it appears that the policy came into the possession of Long as an officer of the United States District Court, and that by such court he has been directed to deliver it over to the plaintiff, and it is because of the refusal to obey such order that plaintiff, claiming ownership of the policy, seeks to obtain possession of it in this action of replevin. As against this we have the defendant, who, under the protection of the order of the District Court, could have safely delivered the policy to the plaintiff, applying for an order of interpleader to substitute as defendant a receiver in a judgment creditor's action, without any facts being presented to show in what way the receiver could be interested in contesting the plaintiff's title. For all that appears the policy might have been originally issued directly to the plaintiff, and thus the essential fact, which we

think should appear, that Marty ever had any title to the policy in question, is absent. On the merits, therefore, the papers being insufficient, the motion should have been denied.

Order accordingly reversed, with ten dollars costs and disbursements, and the motion denied, with ten dollars costs.

VAN BRUNT, P. J., INGRAHAM, McLAUGHLIN and HATCH, JJ., concurred.

Order reversed, with ten dollars costs and disbursements, and motion denied, with ten dollars costs.

EDWARD G. BENEDICT, as Trustee in Bankruptcy of the UNION CLOAK AND SUIT COMPANY, Bankrupt, Appellant, v. JACOB DESHEL and Others, Respondents.

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77	39
77	276
80	374
81	145

*Transfer by a bankrupt — what must be shown to establish that it was fraudulent as to creditors — exceptions to a charge, when not sufficiently definite.*

A transfer made by a bankrupt to a creditor within four months of the filing of the petition in bankruptcy is not voidable under section 80 of the Bankrupt Act (30 U. S. Stat. at Large, 562) unless it appears that the bankrupt was insolvent at the time the transfer was made; that the transfer actually operated to create a preference; that the bankrupt intended to create a preference and that the creditor had reasonable grounds to believe that a preference was intended.

The bankrupt's intent to create a preference need not be proved by direct evidence, but may be established by facts and circumstances from which it can be found that such intent existed at the time the transfer was made.

Where, at the close of a jury trial, the plaintiff's counsel presents fourteen separate requests to charge, an exception taken by the plaintiff's counsel in the following form: "I except to each of your Honor's refusals to charge to\* my several requests," is not sufficiently definite and specific to enable an appellate court to review the trial court's refusal to charge in accordance with the plaintiff's requests.

APPEAL by the plaintiff, Edward G. Benedict, as trustee in bankruptcy of the Union Cloak and Suit Company, bankrupt, from a judgment of the Supreme Court in favor of the defendants, entered in the office of the clerk of the county of New York on the 31st day of March, 1902, upon the verdict of a jury, and also from an

\* *Sic.*

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order entered in said clerk's office on the 4th day of April, 1902, denying the plaintiff's motion for a new trial made upon the minutes.

*J. Woolsey Shepard*, for the appellant.

*Morris Hillquit*, for the respondents.

McLAUGHLIN, J. :

On the 3d of July, 1901, the Union Cloak and Suit Company, a domestic corporation, was indebted to the defendants in this action in a sum upwards of \$1,500, and on that day it assigned to them, to apply on such claim, all of its interest in the sum of \$1,000, which it had previously deposited, for a specified purpose, with the United States Fidelity and Guaranty Company. This sum the defendants subsequently received from the Fidelity and Guaranty Company.

On the 22d of July, 1901, a petition in involuntary bankruptcy was filed against the Union Cloak and Suit Company, and on the thirtieth of the same month it was adjudged a bankrupt. On the nineteenth of August following plaintiff was elected trustee of the bankrupt's estate, and he thereupon brought this action to recover the \$1,000 received from the Guaranty Company upon the ground that the assignment of such sum to the defendants was in violation of section 60 of the Bankrupt Act (30 U. S. Stat. at Large, 562), which reads as follows :

"Sec. 60. Preferred Creditors.—a. A person shall be deemed to have given a preference if, being insolvent, he has procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class.

"b. If a bankrupt shall have given a preference within four months before the filing of a petition, or after the filing of the petition and before the adjudication, and the person receiving it, or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person."

The defendants had a verdict, and from the judgment thereafter entered dismissing the complaint, and from an order denying a motion for a new trial, the plaintiff has appealed.

The real difference between the parties upon this appeal turns upon the construction to be given to the section of the statute referred to. The appellant contends that all he was obligated to prove to entitle him to a verdict was: (1) That the Union Cloak and Suit Company was insolvent at the time the assignment of the \$1,000 was made to the defendants; (2) that the defendants then had reasonable cause to believe that a preference was intended to be given; and (3) that a preference in fact was given, and they were thereby enabled to obtain a greater percentage of their debt than other creditors of the Union Cloak and Suit Company. The respondents contend that the plaintiff was bound to establish, in addition to the foregoing facts, that the Union Cloak and Suit Company *intended* by the assignment to give the defendants a preference. The trial court adopted the construction contended for by the respondents and charged the jury that it was necessary for the plaintiff to prove to entitle him to a verdict "that in transferring to the defendant the \$1,000 the said company intended to give a preference to the defendant." An exception was taken to this portion of the charge, and whether or not it was well taken presents the principal question to be determined upon this appeal.

A transfer of property by an insolvent is not rendered voidable under the section of the statute referred to, unless the transfer is made with an intent to create a preference. This fact must be established, as well as the fact that the preference was thereby created and that the person receiving the same had, at the time, reasonable grounds to believe that a preference was intended. (*Crooks v. People's Nat. Bank*, 72 App. Div. 331; *Crittenden v. Barton*, 59 id. 555; *Matter of Ebert*, 1 Am. Bank. Rep. 340; *Matter of Hall*, 4 id. 671.) The words used in the statute clearly indicate this purpose on the part of the lawmaking power. The words are, "has procured or suffered a judgment," etc., "or made a transfer," etc., words indicating some act on the part of the insolvent in or by which the preference is created and which necessarily imply an intent on his part. The intent, therefore, must be proved — not necessarily by direct evidence, but by facts and circumstances

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from which it can be found that it existed at the time the transfer was made.

It is also urged that the court erred in overruling plaintiff's objection and admitting in evidence in a proceeding in the United States District Court affidavits made by the witness Tate and one Heath, officers of the Union Cloak and Suit Company, which contained statements as to the financial condition of the company a few months prior to the time the assignment was made. This evidence was introduced on the cross-examination after it had been made to appear that an inventory of the cloak and suit company's property had been made at about the same time the affidavit was made and after the witness had given testimony as to its assets and liabilities. It was, therefore, proper for the purpose of testing or impeaching the credibility of the witness Tate.

Error is also claimed because the trial court refused to charge the jury in accordance with plaintiff's requests. At the close of the trial plaintiff's counsel presented to the court fourteen separate requests to charge. It does not appear from the record that the court made any ruling on these requests, and the only exception in reference to them which appears in the record is the following: "I except to each of your Honor's refusals to charge to\* my several requests." This exception is not to any ruling of the court and not sufficiently definite and specific to enable us to review it. (*Read v. Nichols*, 118 N. Y. 224.)

Finally, it is urged that the verdict was against the weight of evidence and that the court erred in not granting defendants' motion to set the same aside on that ground. After a careful consideration of the record we are of the opinion that there was sufficient evidence to go to the jury upon all the questions involved. As to the insolvency of the Union Cloak and Suit Company at the time the assignment was made, there was evidence from which the jury might find that its total assets, including accounts against third parties, were, or that it had reasonable grounds to believe the same were, sufficient to pay all of its debts in full. One of plaintiff's witnesses, the secretary and treasurer of the company, testified that on the seventeenth of July following the time the assignment was made the company was solvent and its assets then exceeded its liabilities. There was also

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\* *Sic.*



other evidence to the same effect, including that of plaintiff's expert accountant. If it were, in fact, solvent, or if it believed itself to be, and there existed facts as a basis for the belief, then there was sufficient evidence to justify a finding that it did not intend, in making the assignment, to give the defendants a preference. If it were, in fact, insolvent, and intended to give a preference, then there was sufficient evidence to go to the jury as to whether or not the defendants had reasonable cause to believe that the Union Cloak and Suit Company intended, by the assignment, to give them a preference over other creditors.

We are of the opinion, therefore, that the case was properly disposed of at Trial Term and that the judgment and order should be affirmed, with costs.

VAN BRUNT, P. J., O'BRIEN and HATCH, JJ., concurred ; INGRAHAM, J., concurred in result.

Judgment and order affirmed, with costs.

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PRINTING TELEGRAPH NEWS COMPANY, Respondent, v. MAY THORNE BRANTINGHAM, Respondent, and LAURA B. WASHBURN, Appellant.

*Transfer of a stock certificate after the announcement of a decision and before entry of judgment for its recovery against the transferrer — when such judgment is admissible against the transferee — effect thereof.*

In an action brought by a corporation against May Thorne Brantingham and Laura B. Washburn for the purpose of determining which one of said defendants was entitled to a certificate of stock of the plaintiff corporation, it appeared that, in a prior action brought by the defendant Brantingham against one Huff, it was adjudged that the certificate belonged to Brantingham; that after the announcement of the decision in that action and before judgment had been entered thereon Huff assigned the certificate to the defendant Washburn.

*Held*, that the defendant Washburn's right to the certificate of stock depended upon whether she took it in good faith, without notice of any infirmity in the title and for value;

That, as it appeared that the defendant Washburn testified as a witness in the action between Brantingham and Huff and had knowledge of the issues involved therein, the judgment roll in that action was properly received in

evidence in the present action as bearing upon the question of her good faith in acquiring the stock and whether she then knew that there was any infirmity in her assignor's title;

That such judgment roll was *prima facie* sufficient, taken in connection with the other facts, to show that she had notice of the infirmity in her assignor's title to the certificate and that it was incumbent upon her to show that such certificate was acquired by her in good faith and for value.

VAN BRUNT, P. J., dissented.

APPEAL by the defendant, Laura B. Washburn, from a judgment of the Supreme Court in favor of the plaintiff and the defendant Brantingham, entered in the office of the clerk of the county of New York on the 2d day of April, 1902, upon the decision of the court rendered after a trial at the New York Special Term.

*J. W. Purdy, Jr.*, for the appellant.

*Paul Wilcox*, for the respondent Printing Telegraph News Company.

*Alexander Thain*, for the respondent Brantingham.

McLAUGHLIN, J. :

This was an action of interpleader brought for the purpose of determining which of the defendants was entitled to a certificate of stock of the plaintiff corporation. The plaintiff had a judgment for the relief demanded and which also determined that the certificate belonged to the defendant Brantingham. The defendant Washburn has appealed "from each and every part of the said judgment."

It is unnecessary to consider the appeal so far as it relates to the plaintiff, because in that respect it must necessarily be affirmed, inasmuch as it seems to have been conceded at the trial, by all of the parties, that the plaintiff was entitled to the relief asked, which was substantially repeated upon the argument, as well as in the brief filed by appellant's counsel. The appellant, however, complains of the judgment in so far as it determined that the certificate of stock belonged to the respondent Brantingham.

The facts, in so far as the same are material to or involved in the question presented on the appeal, are as follows: Joseph Thorne, in his lifetime, was the owner and possessor of the certificate of

stock referred to in the complaint, which he assigned to one Eunice E. Huff, a sister of the appellant. Prior to the commencement of this action, the respondent Brantingham brought an action in the Supreme Court of this State against said Huff, individually and as executrix of Thorne, to recover, among other property, this certificate and the property represented by it, upon the ground that Huff procured the assignment and transfer of such certificate from Thorne in fraud of Brantingham's rights. That action was prosecuted to and resulted in a judgment in favor of the plaintiff, and said Huff was directed to assign and deliver such certificate to Brantingham. After the announcement of the decision of the Special Term in that action, and before a judgment had been entered thereon, Huff assigned and transferred the said certificate to Washburn. Upon the trial of this action the judgment roll in the action between Brantingham and Huff was, against the objection of the appellant Washburn, received in evidence and the exception taken by her to the ruling of the trial court in respect thereto presents the principal question upon this appeal.

The right of the appellant Washburn to the certificate of stock depended upon whether she took it in good faith, without notice of any infirmity in the title, and for value (*Weaver v. Barden*, 49 N. Y. 286; *American Press Assn. v. Brantingham*, 75 App. Div. 435), and any evidence bearing upon that question was material. Before the judgment roll was received in evidence it appeared that the appellant was a witness and gave testimony in the action between Brantingham and Huff, and that she had knowledge of the issues involved therein. It also appeared that the transfer from Huff to her was not made until after the decision in that action had been rendered. This being the situation, we think that the judgment roll was properly received as bearing upon the question of her good faith and whether she then knew that there was any infirmity in the title. If she knew, and this was a material and necessary determination for the court to make, that there was a defect in the title, that it had been determined that the certificate did not belong to Huff, then no one would seriously contend that she could acquire any better title than Huff had, and if Huff did not then have any title, she, of course, got none. The judgment roll was *prima facie* sufficient, taken in connection with the other facts, to show that she had notice

of the infirmity in the title to the certificate, and this cast the burden upon her of showing that the same was acquired by her in good faith and for value. (*Stevens v. Brennan*, 79 N. Y. 254; *Northampton Nat. Bank v. Kidder*, 106 id. 221; *Fifth Ave. Bank v. Forty-second St. & G. S. F. R. R. Co.*, 137 id. 231.) This burden she did not assume at the trial. She was not sworn as a witness and did not deny that she had knowledge of every fact relating to the infirmity in the title of the certificate which might properly be inferred from the fact that she was a sister of Huff, and testified upon the trial between her and Brantingham in relation to the title of the certificate in question. We are of the opinion, therefore, that the trial court properly admitted the judgment roll in evidence, in the absence of any explanation upon the subject, and determined that the certificate of stock belonged to the respondent Brantingham. If we are right in this conclusion, then it necessarily follows that the judgment appealed from should be affirmed.

Judgment appealed from affirmed, with separate bills of costs to the respondents.

O'BRIEN, INGRAHAM and HATCH, JJ., concurred; VAN BRUNT, P. J., dissented.

INGRAHAM, J. (concurring):

I concur in the opinion of Mr. Justice McLAUGHLIN, but I think the judgment in the action between the defendant Brantingham and Huff was also competent as evidence of the title of the defendant Brantingham to the stock in question. It was necessary for Brantingham to prove that she was the owner of the stock. It had stood in the name of Huff upon the books of the corporation, and by this judgment it was determined that, as between Brantingham and Huff, Brantingham was the owner of the stock. To establish Brantingham's title to the stock it would have been competent to prove a transfer to her by Huff, and this judgment, being a determination that she was the owner of the stock, was admissible in evidence to prove ownership.

Judgment affirmed, with separate bills of costs to the respondents.

MARY CLARK, as Administratrix, etc., of JAMES CLARK, Deceased,  
Respondent, v. MANHATTAN RAILWAY COMPANY, Appellant.

*Negligence — death of a track repairer engaged with his head down between the ties of an elevated railroad driving bolts — proof as to the continued violation by the engineers of a rule for the track repairer's protection — when not sufficient to establish direct or constructive notice to the company — duty to station a man near by to warn him.*

In an action to recover damages resulting from the death of the plaintiff's intestate, who was a track repairer employed by the defendant, an elevated railroad company, it appeared that at the time of the accident the deceased was engaged, with his head down between the ties, driving bolts into a guard rail, and that while in this position he was struck and killed by an elevated train. Evidence was given tending to show that a green flag had been posted for the protection of the intestate and that a rule of the defendant required engineers to slow up their trains when approaching a green flag. The case was submitted to the jury upon the theory that liability on the part of the defendant could only be predicated upon the persistent and continued violation by the engineers of the rule requiring observance of the green flag.

The only evidence bearing upon this subject was given by a co-employee of the deceased, who was not vested with any authority in regulating or controlling the actions of other servants of the defendant. He testified as follows: "Q. When this green flag was set what would happen, so far as any of the trains were concerned, with regard to obeying this flag? \* \* \* A. I don't understand. Q. Would the speed of the trains decrease any? A. They didn't seem to mind the flag at all. Q. Didn't mind the flag at all? A. Not that flag. Q. Was that an every-day occurrence previous to this accident? \* \* \* A. Yes; every day."

*Held*, that, assuming that this testimony simply established a failure on the part of the engineers operating trains on the day of the accident to observe the green flag posted for the intestate's protection, such evidence would not warrant a finding that the defendant was negligent in failing to correct a habitual neglect of rules by its servants;

That, assuming that the testimony of the witness applied to all cases in which green flags were displayed and showed that they were habitually disregarded, it was insufficient to establish negligence on the part of the defendant, as it did not show that direct notice of the failure to observe the rule in question had been given to any officer or representative of the company having authority in the premises or that the disregard of such rule had continued for a length of time sufficient to charge the defendant with constructive notice thereof.

*Quare*, whether the defendant was guilty of negligence in failing to station a workman near the deceased to inform him of approaching trains.

APPEAL by the defendant, the Manhattan Railway Company, from a judgment of the Supreme Court in favor of the plaintiff, entered

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in the office of the clerk of the county of New York on the 31st day of March, 1902, upon the verdict of a jury for \$8,000, and also from an order entered in said clerk's office on the 27th day of March, 1902, denying the defendant's motion for a new trial made upon the minutes.

*Frederic A. Ward*, for the appellant.

*Edward J. McCrossin*, for the respondent.

HATCH, J.:

This action was brought to recover damages for claimed negligent conduct upon the part of the defendant, resulting in the death of the plaintiff's intestate.

It appeared upon the trial that the deceased was an employee of the defendant, and upon the 26th day of November, 1901, was engaged as a track repairer, repairing tracks upon the defendant's structure between Fifty-first and Fifty-second streets.

The work in its performance required the deceased to lean over the rails with his head down between the ties and drive up bolts into a guard rail, which was bolted down from the top. While in this position an elevated train running at a high rate of speed struck the deceased and inflicted injuries from which he died.

The theory of the complaint charges the defendant with negligence in failing to provide proper rules and regulations relative to the operation of trains over that part of the structure whereon its employees were working, and in omitting to warn the deceased of the approach of the oncoming train, and for failure to provide any flag, signals or warning to notify the engineer upon the train of the presence of workmen. Upon the trial proof was given upon the part of the plaintiff tending to establish that no flag had been provided to warn the engineers operating the trains of the presence of workmen upon the track, and that in the course of the employment it was customary when an employee was engaged in the performance of the work which the deceased was then doing to station another person near him to give warning of approaching trains; that in the present case the foreman of the gang in which the deceased was employed stood by the deceased when he commenced

to work, but left him in such position before he had finished and went to another point upon the road, a considerable distance to the north, and that at the time when the injuries were inflicted there was nobody sufficiently near to the deceased to give him warning of the approaching train. Some further testimony was given tending to show that the engineers in the operation of their trains habitually disregarded the flags which were placed to warn them of the presence of workmen upon the track. The effect of this testimony will be hereafter noticed.

Upon the part of the defendant, the proof tended to establish that it had formulated and promulgated rules sufficient in themselves, if properly observed, to protect the workmen from danger while so employed, and of such rules the gang with which the deceased worked was informed; that sufficient flags and other implements to give warning were also furnished. Proof was also given tending to show that upon the day in question a green flag was put up at a proper place when the gang began to work, and remained up at the time of the happening of the accident. The rules required that engineers in the operation of trains should come to a full stop when a red flag was exposed and slow up when a green flag was exposed; that it was usual for the protection of the workmen to put up a green flag. The foreman testified that he went with the deceased to the place where he was killed and remained with him for some time, when, his duties calling him elsewhere, he informed the deceased that he was going to leave and that he would have to look out for himself. This was a short time prior to the happening of the accident.

The case was submitted to the jury upon the theory that liability of the defendant could only be based upon a persistent and continued violation of the rules which required observance by the engineers engaged in operating trains of the green flags. The court held that proper rules had been formulated and promulgated and that liability could not be predicated against the defendant for negligence in this regard. Such was the rule announced by the court in denying a motion for a nonsuit, and was several times reiterated in the court's charge to the jury. The case came to rest, therefore, solely and exclusively upon the fact that the jury might predicate negligence of the defendant, based upon a lack of proper

care in seeing that the system of rules which it had formulated and promulgated were properly observed by the agents and servants of the company. The case must, therefore, be supported upon this theory of negligence, or not all. The only evidence in the case bearing upon this subject is found in the statement of the witness Cosgrove, developed as follows: "Q. When this green flag was set what would happen, so far as any of the trains were concerned, with regard to obeying this flag? [Defendant's counsel objected to the question as incompetent and immaterial. The court overruled the objection and defendant's counsel duly excepted.] A. I don't understand. Q. Would the speed of the trains decrease any? A. They didn't seem to mind the flag at all. Q. Didn't mind the flag at all? A. Not that flag. Q. Was that an every-day occurrence previous to this accident? [Objected to by defendant's counsel as incompetent.] The Court: I suppose these gentlemen are going to claim that this man had a right to rely upon some warning. Mr. Towns: Yes, and show also that if they had had any rules they never were observed. [The court overruled the objection and defendant's counsel duly excepted.] A. Yes; every day."

The effect of this testimony is somewhat obscure, as the first statement of the witness is that the engineers in the operation of the trains did not mind that flag. If by this answer the witness is to be understood as applying failure to observe the flag to the engineers operating trains on the day of the accident and limited to the flag then in position, it is clearly insufficient, as no liability could by any possibility attach to the defendant for the negligence of its servants in failing to obey this particular flag at the particular time. A single instance of neglect, or the neglect to observe the flag for a day, would be insufficient upon which to predicate negligence for failure to correct a habitual neglect of rules by its servants, even though it had direct notice of such fact.

Assuming, however, that the testimony of the witness is to be construed as applying generally to all cases when green flags were displayed, and that they were habitually disregarded, we think the proof is insufficient upon which to base a charge of negligence. The witness was a co-employee of the deceased of the same grade, and was not vested with any authority in regulating or controlling the actions of other servants of the defendant. Consequently,



notice to him would not be notice to the company. The proof is entirely silent as to the length of time during which this flag had been disregarded. The disregard of it for a month or a day would be entirely consistent with the statement of the witness, and it does not appear under what circumstances it was done, or whether by particular engineers, or by all. The statement is extremely general in character, and is not sufficient from which it can be seen, or from which an inference can be raised, that the defendant was required to take action thereon. It is not established by this evidence nor was it otherwise claimed that notice of the failure to observe this rule was given to any officer or representative of the company having authority to discharge or regulate the conduct of its servants and employees in respect thereto. As no direct notice was given to any such officer or representative, the case must be brought within the rule authorizing the jury to find constructive notice to the defendant of the habitual disregard of the rule. Upon this subject, the proof entirely fails, as length of time during which the flag had not been observed cannot be determined from anything appearing in the proofs in the case. In *Cameron v. N. Y. C. & H. R. R. Co.* (145 N. Y. 400) it appeared that the servant charged with neglect had for a period of four months prior to the accident been accustomed to habitually violate the defendant's rules by leaving a switch open and unguarded, and it was held in that case that it was insufficient to charge constructive notice upon the master. It is there said: "There is no arbitrary rule of law that charges the master with constructive notice of the negligent omissions of duty on the part of a co-servant, after the lapse of a certain time, under all circumstances. The doctrine of constructive notice is founded upon reasonable and just considerations, and the mere lapse of time is not always the test of negligence on the part of the master."

It is evident that, under the doctrine of that case, the jury were not authorized to find that the defendant had constructive notice of the neglect of its employees in the present case. There is an utter absence of anything in this case showing, or tending to show, that prior to the time of the accident the officers or representatives of the road had knowledge of the neglect of its servants in this particular. There was no direct notice of the existence of any physi-

cal condition of which the defendant ought to have taken notice, or of any other circumstances which, in the discharge of its duty, would or should have called it to its attention. It does not appear that any other accidents of this character had ever happened from this cause, or that there existed any other circumstances from which it could be inferred that the officers and representatives ought, in the proper discharge of their duty, to have discovered it and, therefore, have taken notice. The evidence was utterly insufficient for the court to submit, or the jury to find, negligence based upon the theory upon which the case was submitted to them.

It is said that the defendant was guilty of negligence in failing to station a workman near the deceased to inform him of approaching trains. It is quite clear from the testimony that great care was required to be exercised by the defendant for the protection of the deceased. His employment was one of extreme danger from oncoming trains. To perform the service required of him caused him to occupy such a position as rendered it practically impossible for him to inform himself of the approach of a train, and under such circumstances the defendant was charged with extreme care to see that he was properly protected. It may be that negligence could be predicated of the failure of the defendant to station a person near him to give warning during the time he was so employed, and that the foreman was guilty of an act of negligence in not remaining near him during the entire time he was so engaged, and, if called upon to leave, in not procuring some other person to take his place. The difficulty, however, with this contention is that the defendant has not been heard by the jury upon such question. The court eliminated all such considerations from the case, and presumably they were not discussed by counsel; therefore, this question has not been considered by them. When the court ruled that the jury could only find negligence based upon one consideration, it necessarily eliminated all others, and the plaintiff, under such circumstances, cannot be heard to urge that the judgment be sustained, based upon other matters which have never been submitted to the jury and upon which the defendant has not been heard.

It follows that the evidence was insufficient to support a recovery upon the theory upon which the case was submitted to the jury.

The judgment and order should, therefore, be reversed and a new trial granted, with costs to the appellant to abide the event.

VAN BRUNT, P. J., O'BRIEN, INGRAHAM and McLAUGHLIN, JJ., concurred.

Judgment and order reversed, new trial ordered, costs to appellant to abide event.

CHARLES M. HUBNER, an Infant, by ADOLPH HUBNER, his Guardian ad Litem, Respondent, v. METROPOLITAN STREET RAILWAY COMPANY, Appellant.

*Evidence — testimony given on another trial used by the party calling a witness to discredit him as to matter called out by the adverse party — striking out competent evidence — not a ground of reversal unless the evidence was beneficial to the party complaining thereof.*

In an action brought to recover damages for personal injuries sustained by the plaintiff while riding a bicycle upon a city street, in consequence of his being struck by a horse and wagon owned by the defendant, one of the questions litigated upon the trial was whether the defendant's driver was whipping the horse at the time of the accident. The plaintiff called the driver as a witness and examined him concerning certain details of the accident, but did not examine him as to whether or not he was whipping the horse. Upon cross-examination by the defendant, the driver testified that he did not have a whip in his hand. He was then cross-examined by the plaintiff's counsel upon this point and, for the purpose of discrediting him upon such point and upon other points about which the defendant had questioned him and which had not been touched upon by the plaintiff, the court permitted the plaintiff to read in evidence the testimony given by the witness on a former trial.

*Held*, that the ruling was proper;

That, as the defendant had cross-examined the witness with respect to a matter independent of the direct examination and which was part of the defendant's affirmative defense, it was competent for the plaintiff to cross-examine the witness, as to the matter developed by the defendant, in the same manner as if the witness had been called by the defendant.

The action of a trial judge in striking out, upon the motion of the party producing it, competent evidence, lawfully in the case, does not constitute reversible error, unless it appears that the evidence is in some way beneficial to the other party and that he will be prejudiced by its exclusion.

VAN BRUNT, P. J., and INGRAHAM, J., dissented.

APPEAL by the defendant, the Metropolitan Street Railway Company, from a judgment of the Supreme Court in favor of the plain-

tiff, entered in the office of the clerk of the county of New York on the 15th day of February, 1902, upon the verdict of a jury for \$5,000, and also from an order entered in said clerk's office on the 13th day of February, 1902, denying the defendant's motion for a new trial made upon the minutes.

*Charles F. Brown*, for the appellant.

*John Quinn*, for the respondent.

HATCH, J. :

This action was brought to recover damages for injuries claimed to have been received by the negligent act of one of the defendant's employees. The plaintiff, a boy of the age of about ten years and eight months, was injured while riding a bicycle easterly upon Twenty-sixth street near the corner of Lexington avenue. He and another boy were riding down Twenty-sixth street, and when about fifty feet from Lexington avenue, plaintiff looked up and saw an ash cart coming down the avenue about one hundred feet above Twenty-sixth street. In front of them, standing near the southerly side of Twenty-sixth street, was a horse and wagon, and just behind this standing wagon was a team of horses coming on a trot, hitched to an express wagon. As the express wagon turned out to pass the standing wagon plaintiff's friend, who was riding beside him, ran his bicycle between the two wagons, which were from three to five feet apart. Plaintiff did not attempt to go between the two wagons, but turned out to the left of the express wagon, and when he was about five feet behind it, the driver of the cart coming down Lexington avenue turned his horse suddenly into Twenty-sixth street, at a point about ten to fifteen feet from Lexington avenue, when the horse and the boy upon the bicycle came into collision and the plaintiff received injuries, for which he is now seeking to recover damages. All of the plaintiff's witnesses who saw the driver of the ash cart before the collision testified that the driver was standing up in the cart and whipping the horse; that he was driving rapidly, and that he came down Lexington avenue until about opposite the middle of Twenty-sixth street, when he suddenly turned, still whipping his horse, and ran into the boy on the wheel, at a point in Twenty-sixth street, varying in distance from about ten to fifteen

to upwards of forty feet from Lexington avenue. The driver of the cart testified that he was letting the horse walk; that he had no whip in his hand and was not whipping the horse, and that he turned into Twenty-sixth street to the curb on his right-hand side, and that the plaintiff, who was riding upon his wheel, while attempting to turn around ran into his horse and was thus injured. It is the contention of the appellant that, inasmuch as the plaintiff himself testified that he had passed to the rear of the express wagon when the collision occurred, he then had a clear street to the right and plenty of room to avoid the horse on the ash cart, and that if he collided with it it must have been from his own negligence. It will be seen, however, from an examination of plaintiff's testimony that he had just passed the express wagon, and was about five feet in its rear, when the accident occurred, and it was for the jury to say whether he was able to avoid the collision or turn before the horse struck him. The plaintiff called as a witness McGrath, the driver of the cart, who testified that upon the day of the accident he was working for the defendant driving the ash cart; that as he turned into Twenty-sixth street, about two feet from the curb, and when about fifteen feet from Lexington avenue, the boy, in trying to turn around on his bicycle, ran into the horse's belly and thus received his injuries. The plaintiff asked him nothing about whether he was whipping the horse or not. Upon cross-examination by the defendant he testified that he did not have a whip in his hand. Upon this point he was cross-examined by the plaintiff's counsel, and the evidence was read, which he had given upon a former trial, for the purpose of discrediting him, and upon other points, about which the defendant had questioned him, that had not been touched upon by the plaintiff. The defendant contends that this was error in that it was an attempt by the plaintiff to impeach his own witness. We are of the opinion that the court did not err in the ruling which it made. The cross-examination related to a matter independent of the direct examination, and was part of defendant's affirmative defense; under such circumstance the witness became subject to a cross-examination, in manner the same as to the subject-matter developed by the defendant as the plaintiff would have been entitled to had McGrath been called by the defendant. The limitation of the rule under such circumstances is that witnesses

may not be called to impeach the character, as the party calling the witness vouches for his credibility to that extent. (*Hunter v. Wet-sell*, 84 N. Y. 549; *Fall Brook Coal Co. v. Hewson*, 158 id. 150; *Becker v. Koch*, 104 id. 394.)

Counsel contends that error was committed in permitting the plaintiff to withdraw from the case the testimony given by Dr. Williams. This physician had treated the plaintiff since October, 1898. He examined him at the time of the accident. He did not, therefore, testify as an expert upon a hypothetical state of facts developed by the testimony alone, but from actual knowledge which he had gathered by attendance upon him professionally. The witness was cross-examined by the defendant with respect to the curvature of the spine, with which the plaintiff was afflicted, at considerable length, and the redirect examination related to the subject-matter of the cross-examination which had preceded it. We think that the entire testimony, as given by the witness, was competent and might have been permitted to remain in the case. Counsel for the defendant does not point out in his brief wherein any error was committed in its reception. Being competent and in the case, it is clear that it could not be stricken out and disregarded even though produced by the plaintiff, if the defendant was prejudiced thereby. It having once come into the case, the defendant was entitled to have it remain as well as the plaintiff, if any inference arose therefrom, which could in any view be of benefit to the defendant. (*Frohle v. Brooklyn H. R. R. Co.*, 41 App. Div. 344; *Fredenburgh v. Biddlecom*, 85 N. Y. 196; *Spaulding v. Hallenbeck*, 35 id. 204.)

The learned counsel for the appellant has not pointed out in his brief in what manner, if any, the defendant was, or could be, prejudiced by striking out his testimony. The distinct effect of the testimony which was stricken out was to limit the force of the cross-examination with respect to the curvature of the spine, and the anæmic condition of the plaintiff, and if any benefit was derived by striking it out that benefit inured to the defendant, as it left the cross-examination of the witness upon such subject without any qualifying circumstances. It was, therefore, more favorable to the defendant than it would have been had the testimony so stricken out remained in the case. Error was not, therefore, committed by

the ruling of the court in this regard. The law upon this subject seems to be that even though an error be committed by the court in admitting testimony, yet, if it appear with reasonable certainty that the party has not been prejudiced by the introduction of the evidence, and will not be prejudiced by striking it out, the court is authorized to correct the error. (*Newman v. Ernst*, 81 N. Y. St. Repr. 1, and cases cited.)

In *Erben v. Lorillard* (19 N. Y. 299) it appeared that prejudicial error was committed which could not be cured by striking out. Indeed, it was evident from the conclusions reached by the jury in that case that they did not follow the direction of the court, as with the testimony stricken out nothing remained to support the verdict. It was, therefore, clear that prejudicial error was committed, which was not cured by striking out. In *Traver v. Eighth Ave. R. R. Co.* (3 Keyes, 497) Judge GROVER, who wrote in *Erben v. Lorillard*, modified his statement in the former case and held that it would be proper to strike out testimony if it appeared from the whole case that the jury were not influenced thereby. In the cases relied upon by the defendant the testimony received and stricken out was of a character from which the court could see that the jury must have been impressed thereby, in which case the error in receiving incompetent testimony will not be cured by striking it out. (*Koehne v. N. Y. & Q. County R. Co.*, 32 App. Div. 419; *affd.* on appeal, 165 N. Y. 603.)

In the present case, it is not perceived how competent testimony, which was only favorable to the plaintiff, and which in no view inured to the benefit of the defendant, constitutes prejudicial error against the latter in being stricken out.

We find no error which calls for a reversal of this judgment. It should, therefore, with the order appealed from, be affirmed, with costs.

PATTERSON and LAUGHLIN, JJ., concurred; VAN BRUNT, P. J., and INGRAHAM, J., dissented.

Judgment and order affirmed, with costs.

CHARLES F. SHIRK, Plaintiff, v. WILLIAM BROOKFIELD and CHARLES E. KIMBALL as Receivers of the HECKER-JONES-JEWELL MILLING COMPANY, Defendants.

*Complaint alleging a special contract for services — the plaintiff may under it recover on quantum meruit — allegation that services were worth a certain sum — admissibility of a contract as proof of their value — right of one employed to conduct a business to employ a general manager — a ratification must be, if any, in toto — proof as to the value of services — competency of conversations with one of two receivers.*

Where the complaint, in an action to recover for services rendered by the plaintiff to the defendant, alleges the existence of a special contract, the plaintiff may, if the evidence fails to establish the existence of a special contract, but does show that services were, in fact, rendered, recover upon a *quantum meruit*.

Where the complaint alleges that the services were worth a certain sum and that the defendants had agreed to pay that sum therefor, the plaintiff is entitled to give evidence showing the nature of the services and the extent thereof, the circumstances under which they were rendered and their fair value; a contract made between the parties may also be shown in determining the value of the services.

Where the receivers of a milling corporation, being without practical knowledge of the business, employ the treasurer of the corporation to conduct such business for them, such treasurer has power to employ a general manager and to fix his compensation. In such a case the receivers must ratify or repudiate the contract made by the treasurer *in toto*, and cannot accept part thereof and reject the remainder.

Where, in an action brought by the general manager against the receivers to recover for the services rendered by him, it appears that two contracts of employment were made, one with the treasurer, specifying the amount of compensation to be paid, and one with the receivers which did not specify the compensation, and the receivers repudiate, for want of authority, the contract of employment made by the treasurer, such contract is competent proof upon the value of the services rendered by the plaintiff, as is also the testimony of skilled experts having knowledge of the business and of the value of the services rendered by the plaintiff.

The receivers having entered into a contract of employment with the plaintiff, conversations had by the plaintiff with either or both of the receivers with respect to the subject-matter of the services and the compensation to be paid therefor are competent.

MOTION by the plaintiff, Charles F. Shirk, for a new trial upon a case containing exceptions, ordered to be heard at the Appellate



Division in the first instance, upon the dismissal of the complaint by direction of the court after a trial at the New York Trial Term.

*George H. Fletcher*, for the plaintiff.

*William V. Rowe*, for the defendants.

HATCH, J. :

The plaintiff in the action seeks to recover the value of work, labor and services performed at the special instance and request of the defendants, upon the theory of a *quantum meruit*. By the allegations of the complaint and the proof given upon the trial it appears that the defendants Brookfield and Kimball were appointed receivers of the Hecker-Jones-Jewell Milling Company under an order made by the chancellor of the State of New Jersey in an action pending therein between Joseph A. Knox, as plaintiff, and the Hecker-Jones-Jewell Milling Company, as defendant, and that on the same date, by an order made by Judge LAOOMBÉ of the Circuit Court of the United States for the second judicial district, upon the application of the plaintiff in the before-mentioned action, said persons were duly appointed receivers of the property of the said milling company, situate within the southern district of New York; that the said receivers qualified as such and entered upon the performance of their duties and conducted the business carried on by the milling company; that between the 1st day of March, 1900, and the 22d day of May, 1901, the plaintiff rendered services to the defendants, as receivers aforesaid, and at their request, as general manager of the milling department of said corporation; that said services were reasonably worth the sum of \$18,416.66, being at the rate of \$15,000 per year, which sum the defendant receivers agreed to pay plaintiff therefor; that no part of the same has been paid, except \$9,042.18, and that there now remains due to the plaintiff the sum of \$9,374.48, with interest from the 22d day of May, 1901; that plaintiff has demanded of the said receivers such sum, and that said receivers have refused and neglected to pay the same; that by orders of the chancellor of the State of New Jersey, and of Judge LAOOMBÉ of the Circuit Court of the United States, plaintiff was authorized to bring an action for the recovery of the sums claimed to be due him against the receivers. The complaint demands judgment for the said amount, with interest and costs.

An answer was interposed by the receivers, in which they denied that the said sum averred in the complaint is due to the plaintiff, or any other sum, and alleged that they have paid the plaintiff in full for all services rendered by him. The answer further avers that on or about the 22d day of March, 1900, the defendants, as receivers, personally employed plaintiff as general manager of their business at an agreed compensation of \$7,000 per annum, such employment to be determinable at the pleasure of the defendants; that the plaintiff accepted said employment and acted as general manager until about the 22d day of May, 1901, when he was paid in full and discharged, and that the defendants are not indebted to him in any sum whatsoever. The answer further avers a counterclaim to recover the sum of \$472.72, which it is claimed the plaintiff drew from the business conducted by the receivers in excess of any sums which were due and owing to him, and demanded judgment against the plaintiff, that the complaint be dismissed and that the defendants recover said sum, with interest. At the close of plaintiff's proof the defendants moved to dismiss the complaint, and the court granted the motion and ordered the exceptions appearing in the case and taken upon the granting of the motion to dismiss to be heard at the Appellate Division in the first instance.

The testimony on the part of the plaintiff tended to establish that after the appointment of the receivers, as aforesaid, they employed one Ballou to take charge of the business and conduct the same, and that subsequently the plaintiff had a conversation with Ballou, in which plaintiff stated that the business should make \$300,000 per annum, and that if handled carefully might make \$400,000. Ballou thought the amount which the business could earn, as thus estimated, was excessive; but he finally agreed with the plaintiff that if the business made approximately \$400,000 a year he would pay the plaintiff for services at the rate of \$15,000, and in any event would pay him a fixed salary of \$7,000 per annum. Plaintiff also met the receivers about the same time and had a conversation with them with respect to managing the business, in which the plaintiff expressed himself as being able, by making certain changes in the conduct of the business and dispensing with the services of a number of high-priced people, who were drawing salaries from the corporation, to make the business very profitable. On or about the same

day on which this conversation was had, the defendants wrote to the plaintiff the following letter, omitting the address and signatures :

“NEW YORK, *Mch.* 23d, 1900.

“DEAR SIR.—Confirming our conversation of even date, you are hereby appointed manager of the business of the Hecker-Jones-Jewell Milling Co., now in our hands as receivers. As such manager, you have general charge of the business outside of the finances. In view of the limited money resources of the receivers, it will be necessary for you to carefully advise yourself as to the condition of the treasury, which information you will receive from the treasurer for the receivers, who is instructed to work in close harmony with you. Your employment in this capacity is at the pleasure of the receivers.”

The treasurer referred to in this letter was Mr. Ballou, with whom the defendant claimed to have talked prior to meeting the receivers. Thereupon the plaintiff entered upon the course of his employment, organized the business, and, in the conduct of the same, the milling company, between March 1, 1900, and March 1, 1901, earned as gross profits \$412,971.21, after payment of all ordinary expenses of the business. On May 22, 1901, the receivers discharged the plaintiff from his employment.

The motion to dismiss the complaint was based upon the ground principally that there was an utter lack of authority upon the part of Ballou to make a contract for the plaintiff's compensation, and that the contract as made fixed the measure of compensation at \$7,000 a year, which had been fully paid and discharged. Under the issues as framed between these parties, the plaintiff claimed to recover on a *quantum meruit*, and the defendants averred a special contract, which had been fully discharged by payment. It is the settled law that under a declaration on a special contract, if the proofs fail in establishment of it, but do in fact show the rendition of services, a recovery may be had upon a *quantum meruit*. (*Farron v. Sherwood*, 17 N. Y. 227; *Taylor v. Pinckney*, 3 N. Y. St. Repr. 158; *Sussdorff v. Schmidt*, 55 N. Y. 319.) Under the averments of this complaint, it appears that the services were reasonably worth the sum of \$18,416.66, and that the defendant receivers had agreed to pay the plaintiff for his services such sum. This authorized the plaintiff to give evidence showing the nature of the services and the

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extent thereof, the circumstances under which they were rendered and their fair value ; and the contract which was made may also be shown in determining the value of the services rendered. (*Higgins v. N. & F. R. R. Co.*, 66 N. Y. 604 ; *Hartley v. Murtha*, 5 App. Div. 408.) Upon the proof as it stood when the plaintiff rested, he became entitled to recover upon a special contract for an agreed compensation at the rate of \$15,000 per year, or upon a *quantum meruit*. The proof in the case tended to establish that the receivers had continued Ballou as the treasurer of the corporation, and as the receivers were without practical knowledge in the conduct of the business, Ballou was authorized by them, as the proof tended to establish, to conduct the business. Under such circumstances, he would be authorized to contract for services to be rendered in and about the management of the affairs of the corporation. If this view is to be adopted, then it appears that the plaintiff fulfilled upon his part, by causing the profits of the business to exceed in amount the approximate profits upon which his compensation at \$15,000 a year was dependent.

If it be said, however, that the proof was insufficient to establish Ballou's authority (which we do not concede), then the plaintiff is limited to the contract which he made with the receivers. This is in writing, is clear in its terms, but fails in expression of the compensation to be paid. The arrangement between Ballou and the plaintiff was competent proof upon such subject. It bore directly thereon, had reference to the subject-matter, and came from a person entirely familiar with the business ; and if such testimony be believed, it authorized a recovery for the full amount of the plaintiff's claim, and was for all practical purposes conclusive upon such subject. The defendants occupied a peculiar position in this connection. By their answer, they insisted upon a special contract at the rate of \$7,000 per year, and relieved themselves from liability by showing payment. The contract, which was written and signed by the receivers, does not specify that sum, or any other, as compensation to be paid ; consequently reference to it is inconclusive upon that subject. The defendants are, therefore, limited in support of the special contract for \$7,000 per year compensation to the agreement made with the plaintiff by Ballou, as there is no other evidence in this record showing any other contract than such as is expressed

in these items. The defendants under this condition are driven into an anomalous position. In one breath is asserted a special contract for \$7,000, and in the next is repudiated the authority of Ballou to make any contract; if Ballou had no authority to contract, the receivers had; they made one, and the evidence of the arrangements with Ballou is competent as bearing upon the value of that contract to the plaintiff, whether it be taken for anything else or not. If the defendants stand upon the special contract for \$7,000 compensation, it was made by Ballou; and if they adopt his authority to that extent they are bound to ratify it *in toto*, so far as it related to that subject-matter. In any view, therefore, which is taken of this subject, it is evident that the contract with Ballou was competent evidence as showing the value of the services under the contract made with the receivers, and conclusive as to the amount, if believed. The defendants are bound to accept the entire arrangement made by Ballou with the plaintiff, or none of it. They cannot stand upon a part and repudiate the remainder. It was complete and entire, was one conversation, one arrangement; and the adoption of a part is a ratification of the whole, as it necessarily involves the ratification of Ballou's authority to make it. The testimony of competent and skilled experts, having knowledge of the business and the value of the services rendered by the plaintiff, was also competent and should have been received. (*Mercer v. Vose*, 67 N. Y. 56; *Jackson v. N. Y. C. R. R. Co.*, 2 T. & C. 653; *affd. on appeal*, 58 N. Y. 623.)

As the receivers had contracted with the plaintiff, it is evident that conversations had with either, or both, in respect to the subject-matter of the services and of the compensation therefor, were competent. To hold that both receivers must be present and participate in a given action with reference to the management and control of the receivership property seriously affects the right of the plaintiff to show what he did in connection with the business and the authority therefor. Each receiver was equal in authority to the other, and would have the right in the ordinary conduct of the business to give directions concerning it, and both need not be present or participate therein in order to authorize action thereon. If differences arise between them it does not deprive either of authority to act. They are the representatives of the court, and the act itself, if within the power of the receiver to do, will be upheld. This

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certainly must be the rule where the power to act exists, and the action itself is within their power and has not been repudiated, either by themselves or the court. Where receivers become hostile the court can intervene to remove them and appoint others. (*Meier v. K. P. Ry. Co.*, 5 Dill. 476.) But the act of a receiver, lawful in itself and within his powers, may be upheld and persons are justified in dealing with the receiver to that extent. Indeed, in the present case, the proof shows that the discharge was made by one receiver acting alone, and unless this rule be sustained, then it would follow that such a receiver had no power to dispense with the services of the plaintiff. The defendants rely upon this act, and ask the court to give effect to it, and the plaintiff asks that he be permitted to invoke a like rule. It is clear that the defendants cannot invoke the benefits in one case and deny power in another.

There were numerous rulings by the court upon the trial in sustaining the objections interposed by the receivers, which we think was error. The disposition of such objections, however, is mainly covered by the views we have expressed in this opinion, and need not now be farther considered. We conclude that the exceptions should be sustained and the motion for a new trial be granted, with costs to the plaintiff to abide the event.

VAN BRUNT, P. J., PATTERSON, INGRAHAM and LAUGHLIN, JJ., concurred.

Exceptions sustained, new trial ordered, costs to plaintiff to abide the event.

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ANNIE FERRI, as Administratrix, etc., of FRANK FERRI, Deceased,  
Respondent, v. UNION RAILWAY COMPANY OF NEW YORK CITY,  
Appellant.

*Negligence — charge as to the act of a boy in running upon a street railway track — proximate cause of injury.*

In an action to recover damages resulting from the death of the plaintiff's intestate, a boy twelve years of age, who was struck and killed by one of the defendant's street cars, it appeared that the intestate ran upon the track while playing with some companions. The court ruled that the intestate was guilty of negligence in going upon the track and, although there was no evidence

that he had exercised any care or caution for his safety after getting on the track, left it to the jury to say "whether the negligent entrance upon the track by the boy was negligence which caused or which contributed to cause the accident in question; in other words, whether the negligent entry upon the track by the boy was the proximate cause of the injury in question. If it was, and if after the boy was there, he exercised such care and prudence to avoid danger as was to be expected from a child of his age and intelligence then I say that you may find that the deceased was not guilty of any negligence which caused or contributed to cause this injury in question. \* \* \*

Was the plaintiff's intestate, the boy, free from contributory negligence? If he ran upon this track within a few feet of the car, as some of the witnesses have testified, he was not. He was then guilty of contributory negligence. If, however, as I said before, he got upon this track and stood there looking away from the car in such a position and at such a distance from the car that the motorman by the exercise of ordinary care and prudence should have seen him and should have stopped before the car ran over him, and otherwise exercised reasonable care and prudence, then I leave it to you to say whether his negligently getting upon the track was the proximate cause of the injury of which complaint is here made."

*Held*, that the charge was erroneous as the case was not a proper one for the application of the rule which the court had in mind.

APPEAL by the defendant, the Union Railway Company of New York City, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 14th day of March, 1902, upon the verdict of a jury for \$4,550, and also from an order entered in said clerk's office on the 25th day of March, 1902, denying the defendant's motion for a new trial made upon the minutes.

*Charles F. Brown*, for the appellant.

*Hector M. Hitchings*, for the respondent.

LAUGHLIN, J. :

This is a statutory action to recover for the death of Frank Ferri, alleged to have been caused by the defendant's negligence. The decedent was twelve years of age. The accident occurred on Tremont avenue on the 30th day of September, 1901. For the purpose of permitting the construction of a sewer along the middle of the avenue the defendant's northerly track had been moved north so that the northerly rail was within three or three and a half feet of the northerly curb line. The boy was struck between Marion and Mapes avenues on the northerly track by a west-bound car.

The defendant moved for a nonsuit at the close of the plaintiff's case on the ground that she had failed to establish the cause of action alleged and had failed to show freedom from contributory negligence on the part of the decedent or negligence on the part of the defendant. This motion was renewed at the close of the entire case, and to the denials of the motions the defendant excepted. The court ruled that the decedent was guilty of negligence in going upon the track but left it to the jury to say "whether the negligent entrance upon the track by the boy was negligence which caused or which contributed to cause the accident in question; in other words, whether the negligent entry upon the track by the boy was the proximate cause of the injury in question. If it was, and if after the boy was there, he exercised such care and prudence to avoid danger as was to be expected from a child of his age and intelligence then I say that you may find that the deceased was not guilty of any negligence which caused or contributed to cause this injury in question. \* \* \* Was the plaintiff's intestate, the boy, free from contributory negligence? If he ran upon this track within a few feet of the car, as some of the witnesses have testified, he was not. He was then guilty of contributory negligence. If, however, as I said before, he got upon this track and stood there looking away from the car in such a position and at such a distance from the car that the motorman by the exercise of ordinary care and prudence should have seen him and should have stopped before the car ran over him, and otherwise exercised reasonable care and prudence, then I leave it to you to say whether his negligently getting upon the track was the proximate cause of the injury of which complaint is here made."

The defendant's counsel excepted to that part of the charge quoted in which the court left it as a question of fact for the jury to determine whether the boy's negligence in getting upon the track was the proximate cause of the injury, he contending that, as matter of law, such negligence was the proximate cause.

The sewer had been completed at this point and the trench refilled. The avenue was not paved and no curbing was set. It does not appear whether it had ever been paved or was to be paved. It appears that considerable distance intervenes between the intersecting streets, but it is not shown how thickly populated the street is or the extent of travel thereon. The accident happened between



half-past seven and eight o'clock. It was twilight and the sky and atmosphere were clear. There was an electric light in a store opposite on the southerly side of the avenue and in the street at the northwesterly corner of Mapes avenue less than one hundred feet distant, and another within one hundred and fifty or two hundred feet to the east. Immediately before the accident the decedent and four other boys were playing a game called "kick the can," at the northerly side of the street. The decedent kicked the can onto the track and ran after it in the endeavor to kick it again before being overtaken or "tagged" by one of his playmates. The running time of the car was eight miles an hour, including stops. The testimony as to its speed was conflicting. There was evidence indicating that it was running at the usual speed, "pretty good speed," "pretty fast," and the testimony of one witness indicates that it was running about twelve miles an hour. The testimony was also conflicting as to whether the gong was sounded, or whether the motorman shouted to the decedent or did anything to check the speed of the car before the accident. The accident occurred about twenty-five feet east of Mapes avenue, and the car stopped opposite that avenue. The testimony of two playmates of the decedent, and that of a passenger called by the plaintiff indicated that the boy ran upon the track when the car was manifestly too near to avoid a collision, and that he did not stop or remain standing on the track at all. The testimony of the motorman and of another passenger called by the defendant was also to this effect. Another passenger called by the plaintiff, and still another called by the defendant, did not see the boy, and gave no testimony important upon the point. Cars ran over the track every ten minutes. The motorman testified that running eight miles an hour he could stop the car in a car length and a half or two car lengths.

Another eye-witness to the accident, called by the plaintiff, was a woman who was in a house on the south side of the avenue, a little west of where the accident occurred. She testified that she was aware that the boys were playing there, and "all at once I heard the boys hollering to look out and shouting;" that she then looked out the window and saw the car about thirty feet behind him, approaching very fast; that she heard no bell; that the decedent appeared to have become excited through his playmates shouting to him;

that he ran about five feet in front of the car, evidently endeavoring to get off at the north side, and was hit; that the motorman did nothing to stop the car before the accident, but was looking ahead toward the west, "just looked at the front of his car;" that when she first saw the decedent he was standing still with his back to the car, which was then thirty feet away; that "the car was about thirty feet from him when he started to run off the track;" that she first saw him "standing on the track thirty feet away from the car. He remained standing on the track with his back to the car a little while before he tried to get off, and the car was coming towards him all that time. Then when he started to get off the track, after he had been standing there, the car was about ten feet from him. I do not think he started to get off the track until the car was about ten feet from him — until the boys shouted." This witness previously made a statement in writing to the plaintiff's attorney, which was received in evidence without objection, in which she stated that when she first saw the decedent he was standing in the middle of the track facing west, and the car was thirty feet or more from him; that "just then the other boys \* \* \* screamed and he looked around, and at once started to run west in front of the car and toward the north rail, and continued running vigorously for about ten feet, when the car, continuing at full speed and going faster than the boy was running, struck him. \* \* \* I saw the motorman distinctly, and he never slackened the speed or gave any warning by bell or otherwise until the boy was struck. \* \* \*

It was perfectly possible for the motorman to have stopped the car in the distance between the car and the boy when I first saw both. \* \* \*

The car was going very fast when I saw it, and all the cars go very fast at night."

It could not be said as matter of law on this evidence that the decedent was free from negligence in going upon the track, and the jury would have been justified in finding that he was negligent. As has been seen, the court ruled as matter of law that he was negligent in getting upon the track. Whether the court was correct in this ruling or not need not be determined, for in these circumstances the defendant's exceptions to the charge must be passed upon the same as if the court had left it to the jury to determine whether the

boy was negligent in getting upon the track, and, in case they found him thus negligent, had submitted to them the further question embodied in the instructions to which exception was taken. The material testimony has been stated or quoted, and it will be seen that, with the exception of the witness whose view was from the house across the way, it all indicates that the boy was not and could not have been standing upon the track for any appreciable length of time. A finding that he was would be against the weight of the evidence and would require a reversal. It will also be observed that the testimony of this witness is not consistent. She testifies both that the boy instantly started to run when she saw him, and had run ten feet before he was overtaken by the car, and also that he remained standing on the track until the car approached within ten feet of him and then ran five feet before being struck. But if the jury would have been justified in selecting her version, that he was standing on the track while the car approached from a point thirty feet distant to within ten feet of him, in which she contradicts herself and which is controverted by all of the other evidence in the case, yet, assuming that he was negligent in getting into that position, it is not a case for the application of the rule which the learned trial court applied. In these circumstances his negligence in getting upon the track could not be said to have no connection with the accident. If he was negligent in being where he was, there is nothing to show that he exercised any care or caution for his own safety after being there from which it can be said that the original negligence ceased to be a contributing cause to the accident.

The issue as presented by the pleadings was whether the decedent was free from negligence and whether his death was caused by the negligence of the defendant. There is no allegation that the defendant willfully or heedlessly and recklessly ran him down, which would eliminate his contributory negligence.

It follows, therefore, that the judgment and order should be reversed and a new trial granted, with costs to the appellant to abide the event.

VAN BRUNT, P. J., O'BRIEN and McLAUGHLIN, JJ., concurred; PATTERSON, J., concurred in result.

Judgment and order reversed, new trial ordered, costs to appellant to abide event.

JULIUS MEYERS, Respondent, v. PENNSYLVANIA STEEL COMPANY,<sup>f</sup>  
Appellant, Impleaded with THE CITY OF NEW YORK and Others.

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*Incorporation in a public contract of unconstitutional provisions of the Labor Law — its execution not enjoined at the suit of a taxpayer — general allegations of fraud not admitted by a demurrer — provision requiring material of a particular kind and that the contractor shall have had a plant in operation for a year.*

The fact that provisions of the Labor Law (Laws of 1897, chap. 415, as amd.), inserted pursuant to a mandate of the Legislature in a contract made between the commissioners of the New East River Bridge and a steel company for the construction of the approaches to such bridge, have, since the execution of the contract, been declared unconstitutional by the Court of Appeals, does not entitle a taxpayer of the city of New York to an injunction restraining the execution of such contract, especially when it appears that, at the time such contract was made, the Appellate Division had decided that the provisions in question were properly inserted therein, and when it also appears that there is no allegation in the complaint that the contractor has refused to comply with any of the conditions of the contract on the ground of their unconstitutionality. General allegations of fraud contained in the complaint in the taxpayer's action, not accompanied by allegations of the facts constituting the alleged fraud, are not admitted by a demurrer to such complaint.

The commissioners of the New East River Bridge had power to insert in the specifications for the bridge provisions prescribing the character of the steel desired and requiring that the bidder should have had a plant in operation for a year.

APPEAL by the defendant, the Pennsylvania Steel Company, from an interlocutory judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 1st day of April, 1902, upon the decision of the court, rendered after a trial at the New York Special Term, overruling said defendant's demurrer to the plaintiff's amended complaint.

*William C. Trull*, for the appellant.

*L. Laflin Kellogg*, for the respondent.

LAUGHLIN, J. :

This is an action by a taxpayer to restrain the further execution of a contract in writing, made prior to the commencement of this action between the commissioners of the New East River Bridge and the appellant, for the steel and masonry approaches on the Manhattan and Brooklyn sides of the New East River Bridge.

One of the grounds of the demurrer is that the complaint does not state facts sufficient to constitute a cause of action. This court recently affirmed without opinion a decision of the Special Term sustaining a demurrer to a similar complaint in a similar action upon the same ground. (*Knowles v. City of New York*, 37 Misc. Rep. 195; affd., 74 App. Div. 623.) The learned trial justice followed our decision in *Meyers v. City of New York* (58 App. Div. 539), which he deemed controlling. That action was brought before the work was let to enjoin the making of the contract. It having been alleged that the contract price of the work would be materially increased in consequence of provisions inserted in the specifications requiring the contractor to comply with the provisions of the Labor Law (Laws of 1897, chap. 415, as amd.), which the Court of Appeals had previously declared to be unconstitutional and void (*People ex rel. Rodgers v. Coler*, 166 N. Y. 1), this court held that a cause of action was stated. It now appears that the contract embodying this provision of the Labor Law was made on the 7th day of November, 1900, prior to the decision of the Court of Appeals in the case of *People ex rel. Rodgers v. Coler* (*supra*). It thus appears that, at the time the commissioners prepared their specifications and invited proposals for the work, in inserting the provisions, which it is now claimed render the entire contract void, they merely followed the mandate of the Legislature. Moreover, it appears to have been decided by the court prior to that time in an action to enjoin the award of the contract that these provisions were properly inserted. (*Meyers v. City of New York*, 32 Misc. Rep. 522; affd., 54 App. Div. 631.) Surely the commissioners are not chargeable with bad faith in complying with the statutory law of the State and in not presuming to decide that these provisions of the statute were void especially in view of the decisions of the courts previously made sustaining their constitutionality.

In any event the appellant is an innocent party and it cannot be deprived of its contract rights acquired in good faith merely because some of the conditions imposed have subsequently been declared illegal. Their illegality does not render the contract void, nor does it for this reason become an illegal contract, the execution of which may be enjoined by a taxpayer.

The general allegations of fraud were disposed of favorably to

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this appellant's contention in the *Meyers* case. It was there held that there being no allegations of the facts constituting the fraud, fraud was not admitted by the demurrer. It was there also held that the commissioners were not required to advertise for bids or to let the contract to the lowest bidder, and that, therefore, they were at liberty to require in their specifications a particular kind of steel. In the construction of work of this nature and magnitude, upon the security and safety of which will depend the lives and property of thousands of people, it was but the part of wisdom to require the very best kind and quality of material and to insure the most skillful and scientific workmanship. The provisions in the specifications prescribing the character of steel and requiring that the bidder should have had a plant in operation for a year were designed to accomplish this purpose, and the action of the commissioners in inserting them is to be commended rather than criticised.

Although the Court of Appeals has held that these invalid provisions of the Labor Law are not binding upon a contractor, there is no allegation in the complaint that the appellant has not fully complied therewith or that it has refused to perform any of the conditions of the contract on the ground of their invalidity. The contract remains in full force, and the appellant is proceeding in good faith with the performance of this work thereunder, and is entitled to receive the compensation therein agreed to be paid in accordance with its terms, even though the provisions of the Labor Law are void and might have been omitted. (*People ex rel. Rodgers v. Coler*, 56 App. Div. 98; 166 N. Y. 1; *People ex rel. Treat v. Coler*, 166 id. 144; *Calhoun v. Millard*, 121 id. 69.)

It follows that the interlocutory judgment should be reversed, with costs, and the demurrer sustained, with costs, and final judgment should be directed dismissing the complaint, with costs.

VAN BRUNT, P. J., PATTERSON, INGRAHAM and HATCH, JJ., concurred.

Judgment reversed, with costs, and demurrer sustained, with costs, and final judgment directed dismissing complaint, with costs.

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80	5

CHARLES UGGLA, Appellant, v. ISAAC V. BROKAW, Respondent.

*Demurrer does not lie to an answer containing a denial and new matter — redundant matter merely is not demurrable — a motion to strike out an entire count as redundant is proper — a separate defense setting up new matter provable under preceding denials is not demurrable — allegations as to injury from material falling from a building.*

Where a defense set forth in an answer contains new matter and denials of material allegations of the complaint, such denials may be stricken out upon motion, if the plaintiff is aggrieved thereby, but so long as they remain, a demurrer will not lie to the defense even though the other matter pleaded therein does not constitute a defense.

A demurrer will not lie to a count in an answer pleaded as a separate defense on the ground that the matter alleged therein is redundant, where such matter, if true, will defeat the action.

The power of the court to strike out matter as irrelevant or redundant extends to an entire count pleaded as a separate defense or counterclaim.

*Quare*, whether the authority to strike out irrelevant or redundant matter contained in a pleading is derived from the inherent power of the court or from section 545 of the Code of Civil Procedure.

The complaint, in an action to recover damages for personal injuries, alleged that the defendant was the owner of a certain building and that, while the plaintiff was driving along a public street in front of such building, he was struck by material which blew from the roof thereof. The answer admitted that the defendant owned the reversion of the premises, but denied that he owned the present existing estate therein or that he had possession, occupancy or control of the same, and put in issue the other material allegations of the complaint. The answer also set forth several separate defenses, to the second, third, fourth, fifth and sixth of which the plaintiff demurred upon the ground that they were insufficient upon the face thereof. Each of such defenses reiterated the admissions and denials contained in the preceding part of the answer, and all of them, except the sixth defense, contained the allegation that the defendant never had knowledge or notice of any defect or weakness in the construction of the building or any part thereof.

In the second defense it was alleged that for many years prior to the accident the building described in the complaint was properly and safely constructed, of the best material, by skilled and competent persons, and that it was in the exclusive occupation, care, custody and control of a tenant for years continuously thereafter.

In the third defense it was alleged that the building was erected by a tenant for years, who was in the exclusive occupation, care, custody and control of the premises at the time and so continued for many years thereafter and down to the time of the accident.

In the fourth defense it was alleged that the preparation of the plans for the construction of the building was delegated to a competent and skilled architect

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and engineers, and that both the defendant and his tenant relied upon such architect and engineers and were not skilled or informed in matters relating to the construction of such structures; that such architect and engineers superintended the construction and inspection of the work and materials, and that the only interference on the part of the defendant or his tenant was the signing of the contract by the tenant; that the work was delegated to competent independent contractors who undertook to supply the best materials and most skilled and careful labor.

In the fifth defense it was alleged that the accident was the direct result of "*vis major* in that a hurricane of extraordinary violence unseated from reasonably secure fastenings the materials which injured the plaintiff," and that this result was not produced or contributed to by any faulty or defective construction.

In the sixth defense it was alleged that the injuries were caused solely through the negligence of the plaintiff.

*Held*, that the demurrer was properly overruled;

That, as each of the separate defenses contained denials of material allegations of the complaint, a demurrer would not lie thereto even though the other matter pleaded did not constitute a defense;

That the matter set forth in the several separate defenses would, if true, defeat a recovery; that the fact that none of such defenses contained any new matter, but consisted solely of matter provable under the preceding denials contained in the complaint, did not render them demurrable;

That the remedy of the plaintiff was by a motion to strike out the irrelevant or redundant matter even though such matter included the entire separate defense.

INGRAHAM and HATCH, JJ., dissented on the ground that the facts set forth in the fourth defense did not constitute a defense to the action.

APPEAL by the plaintiff, Charles Uggle, from an interlocutory judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of New York on the 28th day of April, 1902, upon the decision of the court, rendered after a trial at the New York Special Term, overruling the plaintiff's demurrer to the second, third, fourth, fifth and sixth separate defenses contained in the defendant's answer, which demurrers were interposed upon the ground of the insufficiency of such defenses upon the face thereof.

*Flamen B. Candler*, for the appellant.

*Alfred G. Reeves*, for the respondent.

LAUGHLIN, J. :

The action is brought to recover damages for personal injuries alleged to have been sustained by the plaintiff through the negli-



gence of the defendant. It is alleged that the defendant was the owner of the building No. 524 Fifth avenue known as Sherry's; that there were negligently erected and standing on the roof of the building "divers structures" constructed of brick and mortar and inclosed by roofs of metal and glass; that these structures were insecurely fastened; that the bricks were improperly laid with a poor and inferior quality of cement or mortar, so that the roofs and bricks of the structures were in an unstable and dangerous condition and liable to be blown off into the roadway of Fifth avenue; that through the carelessness and negligence of the defendant, who had notice of this dangerous condition, "the roofs of the said structures or one of them and divers bricks, mortar and other building material used in the construction of the said structures or one of them, during a storm of wind and rain, were blown from the roof of the said building" into the roadway of Fifth avenue and upon the plaintiff, who was driving by, inflicting the injuries to recover for which the action is brought.

The answer admits that the defendant is the owner in fee of the reversion, but denies that he is the owner of the present existing estate in said premises or that he has possession, occupancy or control of the same, and puts in issue the other material allegations of the complaint.

Each of the defenses to which the demurrer relates is pleaded as a further and separate defense, and the first subdivision of each recites that the defendant "reiterates and repeats the allegations" in that part of the answer preceding the separate defenses, specifying each paragraph thereof, which includes both admissions and denials; and all, except the sixth, contain the allegation that the defendant never had knowledge or notice of any defect or weakness in the construction of the building or any part thereof. In the second defense it is alleged that for many years prior to the accident the building described in the complaint was properly and safely constructed by skilled and competent persons and of the best material, and was in a safe and secure condition, and that it was in the exclusive occupation, care and custody and control of a tenant for years continuously thereafter. In the third defense it is alleged that the building was erected by a tenant for years, who was in the exclusive occupation, care, custody and control of the premises at

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the time, and so continued for many years thereafter, and down to the time of the accident. In the fourth defense it is alleged that the preparation of plans for the construction of the building was delegated to a competent and skilled architect and engineers; that both this defendant and his tenant fully relied on such architect and engineers and were not skilled and informed in matters relating to the safety of construction of such structures; that such architect and engineers superintended the construction and inspection of the work and materials, and that the only interference on the part of this defendant or his tenant was the signing of the contract by the tenant; that the work was delegated to competent, independent contractors, who undertook to supply the best materials and most skilled and careful labor. In the fifth defense it is alleged that the accident was the direct result of "*vis major* in that a hurricane of extraordinary violence unseated from reasonably secure fastenings the materials which injured the plaintiff," and that this result was not produced or contributed to by any faulty or defective construction. In the sixth defense it is alleged that the injuries were solely caused through the negligence of the plaintiff.

Each of these defenses contains denials of material allegations of the complaint, and, while such denials might have been stricken out upon motion if the plaintiff were aggrieved thereby (Code Civ. Proc. § 545; *Flechter v. Jones*, 64 Hun, 275; *State of South Dakota v. McChesney*, 87 id. 293; *Stieffel v. Tolhurst*, 55 App. Div. 532), yet so long as they thus remain a demurrer will not lie, even though the other matter pleaded does not constitute a defense. (*Flechter v. Jones*, *supra*; *Stieffel v. Tolhurst*, *supra*; *Holmes v. Northern Pacific Railway Co.*, 65 App. Div. 49; *Wintringham v. Whitney*, 1 id. 219.)

But there is another reason why demurrer will not lie in this case. It is not seriously contended that the matters set up in each of these defenses, if true, will not constitute a defense to the action; and it is quite clear that if they be established the plaintiff cannot succeed. The principal, if not the sole contention of the plaintiff is that none of these defenses contains new matter, but that all are provable under the preceding denials, which is undoubtedly true. It does not follow, however, that the defenses are insufficient in law upon the face thereof. The Code provides

that the answer may contain a general or specific denial of each material allegation of the complaint controverted by the defendant, or a statement of any new matter constituting a defense or counterclaim, without repetition (Code Civ. Proc. § 500); but a demurrer is only authorized "to a counterclaim or a defense consisting of new matter contained in the answer, on the ground that it is insufficient in law upon the face thereof." (Code Civ. Proc. § 494.) Inasmuch as the matters set up in these several defenses are not extrinsic to the matters set up in the complaint as the basis of the cause of action, they are not "new matter." (*Manning v. Winter*, 7 Hun, 482.) Where a pleading contains matters not authorized in such a pleading, so that it cannot be made a material issue, it may, if a party be aggrieved thereby, be stricken out by the court upon motion. (*Eidlitz v. Rothschild*, 87 Hun, 243; *Frank Brewing Co. v. Hammersen*, 22 App. Div. 475; *Rensselaer & Washington Plank Road Co. v. Wetsel*, 6 How. Pr. 68.) There seems to be some confusion in the decisions as to whether this authority is derived from section 545 of the Code, which authorizes the striking out of irrelevant, redundant or scandalous matter contained in a pleading, "upon the motion of a person aggrieved thereby," or whether it is founded upon the inherent power of the court. It is not essential that we should determine whether the power to strike it out is inherent or expressly conferred; but it may be observed that matter which can have no bearing on the issues, either on account of its manifest irrelevancy or because the law declares that it cannot be introduced, would seem to be irrelevant; and if it be a repetition of matter already at issue by other parts of the pleading, it would be surplusage and would fall under the authority to strike out redundant matter. It is contended, however, that this authority to strike out matter as irrelevant or redundant does not extend to an entire count pleaded as a separate defense or counterclaim. The case of *Walter v. Fowler* (85 N. Y. 621) is cited as authority for this proposition. We think the Court of Appeals did not so hold in that case. There an attempt was made to set up a counterclaim and a motion was made to strike it out; and the court held that it contained a semblance of a cause of action, and that while its sufficiency might be tested by demurrer, it could not be by motion. In *Goodman v. Robb* (41 Hun, 605) the court did say that "an entire

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count cannot be stricken out as irrelevant or redundant;" but the matter there under consideration was neither irrelevant nor redundant, and it was not a motion to strike out matter as irrelevant or redundant. It is also stated in the opinion in that case that "irrelevant and redundant matter cannot be demurred to, but the objection must be taken by a motion to strike out." The only point necessarily decided in that case, however, was that the sufficiency of a count of relevant matter could not be determined by motion. We think a demurrer will not lie to a count of an answer pleaded as a separate defense on the ground of redundancy, where the matter thus pleaded as a defense, if true, will defeat the action. In the case at bar the matter is redundant; but since if true it will bar a recovery, we think it cannot be said that the defense, whether consisting of new matter or not, is insufficient in law upon the face thereof, which, as has been seen, is the only ground upon which a demurrer is authorized by the Code. (*Wiley v. Village of Rouse's Point*, 86 Hun, 495; *Flechter v. Jones*, *supra*; *Holmes v. Northern Pacific Railway Co.*, *supra*; *Moak's Van Sant*. Pl. 771.)

In the case of *Bogardus v. Metropolitan St. Ry. Co.* (62 App. Div. 376), which was an action for personal injuries, we held that the plaintiff was not aggrieved by an allegation in the answer setting up that the accident occurred through his contributory negligence and without negligence on the part of the defendant, and that his motion to strike this out as irrelevant or redundant should be denied. The reasons for that decision do not apply to any of the counts of this answer except the last, and we do not intend to express any opinion as to whether the other counts of the answer are so unnecessary and of such a character that the court would be justified in striking them out as redundant. There should be, and we think there is, a remedy by motion for striking out *redundant* matter, even in those cases where it embraces an entire count pleaded as a separate defense. Recourse may and should be had to this remedy where there has been a departure from the usual practice to the prejudice of the adverse party by unduly lengthening a pleading or otherwise confusing or obscuring the issues.

It follows that the interlocutory judgment should be affirmed, with costs.

PATTERSON and O'BRIEN, JJ., concurred.

INGRAHAM, J. :

I concur in the conclusion of Mr. Justice LAUGHLIN, except as to the fourth defense. I do not think, however, that where new matter is pleaded as a separate defense to the action, and there are repeated as a part of that defense denials of allegations of the complaint which have no relation to the new matter pleaded, the court is prevented from determining upon demurrer whether the separate defense as a whole is sufficient in law upon the face thereof. Each separate defense must be taken as a whole, and if the facts alleged are not sufficient as a separate defense, as distinguished from a denial of allegations alleged in the complaint, then a demurrer to that separate defense should be sustained, although as a part of that defense material allegations of the complaint are denied. I agree with Mr. Justice LAUGHLIN, however, that as to each of the defenses, except the fourth, the facts as alleged constitute a defense to the action. By the fourth defense the defendant, by realleging allegations in paragraphs 1 to 5 of the answer, admits that he is the owner of the building, and then alleges that the planning, erection and construction of the building described in the complaint was fully and fairly committed to competent and skilled architects and engineers, qualified for such work, under instructions to plan and erect a thoroughly safe and substantial structure; that the defendant was not skilled or informed in said matters, and entire reliance was placed in said architects and engineers in all matters pertaining to the preparations of plans and specifications, and to the superintendence and inspection of said work and construction and materials; that the defendant did not interfere with the said architect or engineer in the discharge of their duties; that the work of constructing said building was intrusted to independent contractors who were skilled and competent persons qualified for such work and had contracted to supply the best materials and the most skillful and careful labor, and to do all to the satisfaction of the architects and engineers, and that the defendant never had any knowledge or notice of any defect in the construction or condition of said building. The plaintiff was injured while in Fifth avenue in the city of New York, a public street, by the fall of brick, mortar and other building materials from the building which the plaintiff owned. In such case the rule *res ipsa loquitur* applies, and from the incident itself the jury

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are authorized to infer negligence. I know of no principle by which the owner of a building upon a public street is as a matter of law relieved from liability for injury to persons lawfully upon the street caused by the faulty construction of the building because he has selected architects or contractors to construct the building and relied upon their skill and diligence to make the building safe. Where the accident happened because of negligence of an employee of a contractor engaged in erecting a building, the building itself being properly and securely constructed, the contractors would be alone liable; but where the accident is occasioned by the faulty construction of the building, so that after it is erected it is unsafe, and falls into the street, injuring a person rightfully there, I do not understand that the owner of the building can as a matter of law be relieved from responsibility for the insecure and unsafe building because he had employed competent architects or contractors to plan and perform the work of constructing it.

I think, therefore, that this separate defense was insufficient and that as to that defense the demurrer should have been sustained.

HATCH, J., concurred.

Judgment affirmed, with costs.

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THEODORE P. SPITZ, Appellant, v. OTTO C. HEINZE and Others,  
Respondents.

*Discharge of a servant — defense that it was for good cause — bill of particulars thereof.*

Where a servant brings an action against his master to recover damages for his wrongful discharge, the defense that the plaintiff was discharged for good and sufficient cause is an affirmative one which must be pleaded and proved by the defendant.

The same authority exists for requiring a bill of particulars of an affirmative defense as for requiring a bill of particulars of the plaintiff's claim.

In granting a bill of particulars the court should so exercise its discretion as to avoid compelling the party required to serve the bill of particulars to make an undue disclosure of the evidence on which he relies to establish the facts in issue.

APPEAL by the plaintiff, Theodore P. Spitz, from an order of the Supreme Court, made at the New York Special Term and entered

in the office of the clerk of the county of New York on the 30th day of June, 1902, denying the plaintiff's motion for a bill of particulars of the counterclaim set up in the defendant's answer.

*Wales F. Severance*, for the appellant.

*Daniel P. Hays*, for the respondents.

LAUGHLIN, J. :

The action is brought to recover damages for a breach of contract of employment. The plaintiff alleges that on the 13th day of April, 1900, he was employed by the defendants to manage their domestic hosiery department for the term of three years from the 1st day of June, 1900; that his compensation was to be forty per cent of the net profits of that department, the expenses to be deducted being stated; that they were to advance to him the sum of \$4,000 per annum in equal monthly installments, such advance to be deducted from his portion of the net profits, but he was not to be required to account therefor in case his share of the net profits should not equal that sum; that he was to devote his entire time, energy and intelligence to the management of the department and to use his best efforts to make the same profitable; that the management and control of the business was to be left in his hands subject to the right of the defendants "to veto any proposition" he "might wish to go into;" that on the 9th day of December, 1901, while he was engaged in his employment under said contract, he was discharged by the defendants and excluded from their place of business.

The answer admits the employment and the discharge, but alleges that the discharge was for cause, and sets up fourteen grounds as constituting the cause of his discharge. It is with reference to these grounds of the discharge that the plaintiff desires a bill of particulars.

This is an affirmative defense, and the burden is upon the defendants of both alleging and proving that he was discharged for good and sufficient cause. (*Linton v. Unexcelled Fireworks Co.*, 124 N. Y. 533; *Raeder v. Ibert*, 39 N. Y. St. Repr. 121.)

There is the same authority for requiring a bill of particulars of an affirmative defense as for requiring a bill of particulars of the plaintiff's claim. (Code Civ. Proc. § 531; *Dwight v. Germania Life Ins. Co.*, 84 N. Y. 493; *Tilton v. Beecher*, 59 id. 176.)

Bills of particulars should be required when necessary for the purpose of preventing surprise and needless preparation, but the discretion of the court should be so exercised as to avoid an undue disclosure of the evidence of the adverse party by which he may establish the facts at issue. (*Taylor v. Security M. Life Ins. Co.*, 73 App. Div. 319; *Baltimore Machine Works v. McKelvey*, 71 id. 340; *Mussinan v. Willner Wood Co.*, 69 id. 448; *English v. Westchester Electric R. Co.*, Id. 576; *Bell v. Heatherton*, 66 id. 603.)

In the case at bar the plaintiff's demand for a bill of particulars is altogether too broad. It is alleged in the answer that the plaintiff failed to devote his entire time, energies and intelligence to the business; that he did not use his best efforts to make the business profitable; that he was not attentive to business, remained away all day on Saturdays and frequently stayed away on other business days, claiming that he had been detained by private matters; that he arrived after office hours in the morning and departed before the close of business hours for the day. We think that the defendants should not be limited in their evidence on these subjects by a bill of particulars, and that the answer apprises the plaintiff of all that is essential for him to know to enable him to defend against the charges. This defense, though stated in general language, is sufficiently definite, and more cannot be required without unduly calling for the evidence itself.

It was also alleged in the answer that the plaintiff was insolent and impertinent to customers and sent to them irritating and unnecessarily severe and impertinent letters and antagonized customers "thereby causing defendants to lose many customers and injuring their business." Whether the plaintiff's conduct in this regard resulted in the loss of customers or injury to the business is not material. If he was insolent and impertinent to customers, such conduct was calculated to result in a loss of customers and an injury to the business, and doubtless justified his discharge. It is evident that the defendants who placed the plaintiff in charge of the business are not themselves in a position to know these facts. They must depend for their knowledge either upon information from other employees or from the customers. It might be impossible for them to specify the customers, for the names might not be known, and we think it would be unreasonable to require them to further



particularize a defense of this kind by giving dates or circumstances. So far as the defense relates to his letters they are the best evidence, and there is little danger that he can be taken by surprise by their non-production, for proof of their loss would ordinarily have to be made by the customers to whom they were sent.

We think the plaintiff is entitled to a bill of particulars specifying (1) which defendant or defendants it is claimed he was impertinent to, which defendant or defendants gave him orders, instructions and directions that he failed to obey, and what the orders, instructions and directions were; (2) upon what goods the plaintiff, contrary to the instructions and directions of the defendants, raised the prices; (3) the names of the firms who were customers of the defendants from which it is claimed that the plaintiff solicited patronage and offered goods at a price different from that previously offered by the defendants, specifying the price; (4) what expenses were incurred by the plaintiff contrary to the directions and instructions of the defendants and charged to the defendants giving approximately the date or dates; (5) what mills the plaintiff attempted to contract with without consulting defendants; (6) what employees the plaintiff attempted to secure contrary to the instructions of the defendants, giving the names and approximately the dates; (7) what goods were purchased by plaintiff above the market price, and *either the market price or the date*; (8) what books of account it is claimed the plaintiff retained in his possession; and (9) what contracts made with manufacturers the plaintiff violated, giving the names of the manufacturers, dates of contracts and particulars of violation. These are the only items of which we think the plaintiff is entitled to a bill of particulars.

It follows, therefore, that the order should be reversed, with ten dollars costs of appeal and disbursements, and the motion for a bill of particulars granted, as indicated in this opinion.

VAN BRUNT, P. J., PATTERSON, INGRAHAM and HATCH, JJ., concurred.

Order reversed, with ten dollars costs and disbursements, and motion for bill of particulars granted as indicated in opinion.

AUGUST SCHIECK, Respondent, v. ANNIE DONOHUE, Appellant,  
Impleaded with Others.

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81	169
D178 NY	638

*Demurrer to an answer — the sufficiency of the complaint considered thereunder — a plea of the pendency of another action to recover the debt as a defense to a foreclosure — it must allege that it was brought without leave of the court — allegation in a complaint that no other action was pending — sufficiency of a tender not kept good — it will not sustain a claim to have a mortgage annulled — when it will prevent an election to declare the principal sum due.*

Upon the hearing of a demurrer to an answer the defendant may attack the sufficiency of the complaint.

An answer, interposed in an action to foreclose a mortgage, which alleges the pendency of another action between the parties to recover the mortgage debt is demurrable, unless it also alleges that the action which it pleads in bar was brought without leave of the court. (Code Civ. Proc. § 1628.)

An allegation in the complaint in a foreclosure action, "that no other action has been had for the recovery of the said sum secured by the said bond and mortgage," sufficiently complies with that provision of section 1629 of the Code of Civil Procedure which provides that the complaint "must state whether any other action has been brought to recover any part of the mortgage debt."

A tender of payment of the full amount due upon a bond and mortgage constitutes a good defense to an action to foreclose the mortgage, although the tender is not kept good.

A plea of tender, contained in the answer interposed in such an action, will be sustained although it is not averred that the tender has been kept good and no offer is made to pay the money into court.

This doctrine proceeds upon the ground that the tender discharges the lien of the mortgage, but not the mortgage debt. Consequently, where a mortgagor, who has made such a tender, seeks to have the mortgage canceled and discharged of record, he will not be granted such relief until he pays the mortgage or brings the amount thereof into court.

Where a mortgage contains a provision that the whole of the principal sum should become due at the option of the mortgagee, after default in the payment of interest for thirty days, and the mortgagee, acting under this clause, elects to declare the principal sum due and brings an action to foreclose the mortgage, an answer interposed in such action which alleges that the defendant duly tendered to the plaintiff the full amount of interest due him in cash, personally, and that said plaintiff deliberately and willfully refused to accept the same, and further that the defendant made a tender within the time prescribed for the payment of the interest and has ever since been ready and willing to pay the same, is not demurrable, as the averments, if true, prevented an exercise by the plaintiff of his option to treat the whole of the principal sum as due and payable.

APPEAL by the defendant, Annie Donohue, from an interlocutory judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 23d day of April, 1902, upon the decision of the court, rendered after a trial at the New York Special Term, sustaining the plaintiff's demurrer to two separate defenses contained in said defendant's answer.

*J. Wilson Bryant*, for the appellant.

*Peter Cook*, for the respondent.

HATCH, J. :

This action is brought to foreclose a mortgage, after default in the payment of interest, under a clause therein authorizing the mortgagee upon such default to elect to treat the whole amount as due. In the 4th paragraph of the answer the defendant avers for a further and separate defense that there is another action pending between the same parties, brought by the plaintiff for the same sum of money, and that it is now pending. The 5th paragraph pleads a tender of payment within the time prescribed in the mortgage. The demurrer was to these two defenses and was based upon the ground that each was insufficient in law upon the face thereof.

The demurrer to the 4th paragraph was sustained upon the ground that section 1628 of the Code of Civil Procedure does not prohibit the bringing of an action to recover the whole or any part of the mortgage debt, but that such action may be brought with leave of the court in which the foreclosure action is pending. The answer does not aver that the action, which it pleads in bar, was brought without leave of the court, and, therefore, such pleading was held bad for failure to make such averment. To this extent we think the demurrer is good.

It is claimed, in aid of the defendant, that the complaint is bad in failing to allege that no action has been brought to recover any part of the mortgage debt, and that, therefore, she may attack such pleading, and such undoubtedly is the rule. By the provisions of section 1629, the complaint in an action to foreclose a mortgage is required to state whether any other action has been brought to recover any

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part of the mortgage debt, and, if so, whether any part thereof has been collected. These two sections construed together make it the evident purpose that no action shall be brought to recover a mortgage debt where an action to foreclose the mortgage is pending, and in order to prevent the same the complaint in the action to foreclose is required to affirmatively aver that no other action has been brought to recover the same. The complaint in this action complies with such requirement. Its statement is "that no other action has been had for the recovery of the said sum secured by the said bond and mortgage." The Code provision is that it "must state whether any other action has been brought to recover any part of the mortgage debt." The averment of the complaint substantially covers the matter which the Code requires. It is not necessary that it be alleged in the express language of the statute. It is sufficient if it states the facts from which it appears that compliance has been had with the Code provisions. It is evident, therefore, in view of the averments of the complaint, as well as the provisions of section 1628 of the Code, that the defendant was required to show affirmatively that the former action was pending without authority of law, and in order so to show it she was required to plead that the action, which she sought to establish as a bar, was brought without the consent of the court. Her pleading, therefore, fails in this respect.

As to the plea of tender contained in the 5th clause a different question arises.

It seems to be well settled that where the whole amount secured to be paid by a mortgage is due and payable, a tender of payment of the full amount due constitutes a good defense to an action for the enforcement of the mortgage, without the tender being kept good, and a plea of tender contained in the answer interposed in such an action will be sustained, although it is not averred that the tender has been kept good and there is no offer to pay the money into court. (*Tuthill v. Morris*, 81 N. Y. 94; *Nelson v. Loder*, 132 id. 288.)

The ground upon which this doctrine proceeds is that the tender discharges the lien of the mortgage, and, therefore, an action will not lie to enforce the same under these conditions, but where the mortgagor seeks in an action to obtain affirmative relief, as where

he asks that the mortgage be canceled and discharged of record, equity will not grant the relief asked, as the tender only relieves the land from the lien of the mortgage, so far as to prevent its enforcement against the land. The mortgagor still owes the debt and is in equity bound to pay the same, and while the legal right to enforce it against the land is gone, yet equity will not interpose and adjudge that the security be either surrendered or extinguished without the mortgagor pays the amount equitably due thereon, and if he demands this relief, before equity will grant it, he is required to pay the amount of the mortgage or bring the money into court and surrender it. (*Tuthill v. Morris, supra* ; *Werner v. Tuch*, 127 N. Y. 217.)

If, therefore, the whole amount of this mortgage was due and payable, the plea of tender is good to prevent its enforcement by foreclosure, even though the tender was not kept good and there was no offer to pay the money into court. So treated, the answer constitutes a good plea. This, however, is not the exact question presented upon the present issues. The principal of the mortgage in this case was not due and payable by the terms of the mortgage, except at the option of the mortgagee upon failure to pay the interest. It was averred in the complaint that interest upon the bond and mortgage was required by the terms of these instruments to be payable semi-annually, and that it was the express agreement, contained in the mortgage, that the whole of the said principal sum should become due at the option of the mortgagee after default in the payment of interest for thirty days ; that interest on the bond and mortgage became due and payable on the 6th days of April and October, 1901 ; that it had not been paid ; that more than thirty days have elapsed since the same became due and payable, and that the plaintiff has elected and now elects to deem the whole principal sum to be immediately due and payable. The action of foreclosure was commenced on or about the 18th day of November, 1901. The averment in the answer is that before the commencement of the action, the defendant duly tendered to the plaintiff the full amount of interest due him in cash personally, and that said plaintiff deliberately and willfully refused to accept the same ; and further that the defendant made a tender within the time prescribed for the payment of the interest, and has ever since been ready and willing to

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pay the same. The effect of this answer is to aver that the defendant tendered to the plaintiff the amount that became due for interest within the thirty days from the respective days when the same fell due, and if this be true, then it is clear that the defendant was not in default, and consequently there would be no basis authorizing the plaintiff to act upon the option contained in the mortgage and declare the whole sum to be due. In effect, the failure to pay interest worked a forfeiture of defendant's right to the extended period of time for the payment of the money, as expressed in the mortgage, and under such circumstances a plea of tender would be good, as its effect would be to prevent an exercise of the election or option by the mortgagee to treat the whole sum as due and payable. The plea in this case clearly raises such questions and brings it within the principle of the cases to which we have called attention, and is sufficient to prevent a forfeiture of the defendant's rights secured by the mortgage.

It follows from these views that the interlocutory judgment should be affirmed as to the 4th clause of the answer and reversed as to the plea of tender contained in the 5th clause, with leave to the defendant to answer over within twenty days, upon payment of costs in the court below. No costs of this appeal allowed to either party.

VAN BRUNT, P. J., O'BRIEN, INGRAHAM and McLAUGHLIN, JJ., concurred.

Judgment affirmed as to the 4th clause of answer, and reversed as to the plea of tender contained in the 5th clause, with leave to defendant to answer over within twenty days on payment of costs in the court below. No costs of appeal allowed to either party.

THE MERRITT & CHAPMAN DERRICK AND WRECKING COMPANY,  
Respondent, v. WALTER J. TICE and Others, Appellants.

*Salvage*—an action for, does not lie in a State court—a State court has jurisdiction where services have been rendered to a stranded barge under a contract.

A State court has no jurisdiction of an action brought to recover upon a marine contract for salvage; such a court has, however, jurisdiction of an action brought by a wrecking company against the owner of a barge which had gone ashore on the coast of Long Island, to recover the value of work, labor and services rendered by the wrecking company, pursuant to a contract with such owner, in floating the barge and taking it to the port of New York, although the wrecking company might, in the absence of a contract, have been entitled to a claim for salvage for the services rendered.

APPEAL by the defendants, Walter J. Tice and others, from an order of the Supreme Court, made at the New York Trial Term and entered in the office of the clerk of the county of New York on the 30th day of April, 1902, setting aside the direction of the trial court, made before the opening of the case dismissing the complaint, and granting the plaintiff's motion for a new trial.

*James Emerson Carpenter*, for the appellants.

*Avery F. Cushman*, for the respondent.

HATCH, J.:

The complaint avers that the plaintiff is a corporation, and that the defendants were partners and owners of the barge *E. W. Stetson*; "that at the special instance and request of the defendants, between the 3d day of December, 1898, and the 6th day of January, 1899, both dates inclusive, the plaintiff performed certain wrecking services and work and labor and furnished certain materials to the defendants in and about the rescue and floating of the said barge *E. W. Stetson* which was ashore off the north shore of Long Island, near Jamesport, New York, and bringing the same to the port of New York, putting her upon a drydock and delivering her to the defendants. \* \* \* That said wrecking services, work and labor and materials furnished were of the fair and reasonable value of \$4,249.48, no part of which has been paid, although duly demanded." Judgment was asked for the recovery of said sum. Before any

proof was taken upon the trial, the defendants moved to dismiss the complaint upon two grounds, *first*, "that the court has no jurisdiction of the subject of the action," and, *second*, "that the complaint does not state facts sufficient to constitute a cause of action." It was the contention of the defendants that the complaint merely set forth that the plaintiff had acted in and about what it did in rescuing the barge as a salvor, and that the Federal court alone had jurisdiction of the subject-matter. The court so held and ruled in dismissing the complaint. Subsequently a motion was made for a new trial, and upon such hearing the court reached the conclusion that the State court had jurisdiction of the subject of the action and, therefore, set aside the order and granted a new trial. This appeal is taken from such order.

It is conceded by both parties hereto that if the contract averred in the complaint is a marine contract for salvage, the State courts have no jurisdiction. Such undoubtedly is the rule. It does not follow, however, that a valid contract may not be made for compensation for work, labor and services, even though the subject-matter of the action might furnish the basis of a claim for salvage. The two matters are quite distinct. Where the contract is made to perform work, labor and services, either for a sum agreed upon or for a reasonable compensation for the services performed, such contract is good and may be enforced *in personam*. If there were no contract, a claim only for salvage might arise. The disposition, however, of such question rests upon different principles, and facts which would support one would wholly fail in support of the other. Thus, in a case of salvage, the right of the person making the rescue to compensation is dependent solely upon the fact that the property is saved; this is a condition precedent to his right to receive any award. The amount of the award rests in the discretion of the court. In the case of a contract to perform work, labor and services in connection with the rescue of a vessel, subject to marine perils, the right of recovery for such service depends upon its rendition pursuant to the contract, and the party entitled to recover for such services is not deprived of such right even though the subject-matter be wholly lost. This distinction is recognized in the cases (*The Independence*, 2 Curt. 350; *Bondies v. Sherwood*, 22 How. [U. S.] 214). A claim for salvage and a claim for work,



labor and services are inconsistent. In *The Independence* (*supra*), CURTIS, J., said: "When, therefore, the subject-matter of a contract is a mere attempt to save property, and when the owner or his representative, or both, become personally liable by the contract, to pay either an agreed sum, or a *quantum meruit*, for the labor and service rendered, without regard to its results, the parties do not contemplate nor engage in a salvage service, but quite a different service. I know of no reason which forbids parties competent to contract, from fairly contracting concerning such a subject-matter, nor do I perceive how a court of admiralty can, after the property has been saved, set aside such a contract and declare that a salvage service was performed."

Upon the averments of the complaint in the present case the plaintiff will be authorized to prove a contract for work, labor and services, and, if established, recover therefor the fair value thereof, even though it might have become entitled to salvage for the services rendered, in the absence of a contract. It is clear, however, that in order to maintain the action, it must prove the existence of a contract for the rendition of the service. Under the pleadings, the plaintiff could not recover upon the theory that it was entitled to salvage, as its right of recovery is strictly *in personam*, and rests upon contract.

It follows, therefore, that the order granting plaintiff's motion for a new trial should be affirmed, with costs to the respondent to abide the event.

VAN BRUNT, P. J., PATTERSON, INGRAHAM and LAUGHLIN, JJ., concurred.

Order affirmed, with costs to respondent to abide event.

CHARLES L. ZIMMERMAN, Respondent, v. EMIL B. MEYROWITZ,<sup>p 77</sup>  
Appellant. (Action No. 3.)<sup>77 829</sup>  
<sup>77 639</sup>

*Pleading—when it may be declared to be frivolous—when it may be stricken out as sham—effect of a failure to allege a material fact.*

A pleading should not be declared frivolous if any argument is required to show its frivolity.

An answer cannot be stricken out as sham unless its falsity be made to appear beyond a reasonable doubt.

An answer, averring matters which constitute a defense to the action, cannot be stricken out as sham simply because the defendant fails to allege therein a material fact which he had alleged in a previous answer that had been declared bad on demurrer.

APPEAL by the defendant, Emil B. Meyrowitz, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 20th day of September, 1902, upon an order made at the New York Special Term and entered in said clerk's office on the 19th day of September, 1902, striking out the separate defense contained in the defendant's answer as sham, and awarding judgment to the plaintiff upon the remainder of the answer, and also from said order upon which the judgment was entered.

*John L. Hill*, for the appellant.

*J. Noble Hayes*, for the respondent.

HATCH, J.:

It appears from the proceedings had before the learned court at Special Term that he adjudged that a part of the answer was sham and the remainder frivolous, and thereupon ordered the former stricken out and awarded judgment. The practice is well settled that frivolous pleadings may not be declared such and judgment ordered thereon if any argument is required to show their frivolity. (*Cook v. Warren*, 88 N. Y. 37.) In this case we have but to refer to the ten pages of brief, submitted by the respondent in support of the order, in order to determine that an argument was necessary to

demonstrate its character. A sham answer may not be stricken out, except that its falsity be made to appear beyond a reasonable doubt. In the present case we do not think it appears; but, on the contrary, if its averments be true, a good defense is disclosed therein; and no basis exists for holding that the answer is false.

By the record the following facts are disclosed: The plaintiff was the inventor of an acetylene gas lamp, which he desired to sell or procure to be manufactured. For this purpose the parties entered into a contract whereby the plaintiff agreed to give to the defendant the exclusive right to manufacture and sell said lamp in the United States, and the defendant agreed to pay therefor a certain royalty. The defendant having failed to fulfill the contract by manufacturing and selling the lamps, an action was brought to recover the royalty therein reserved. The defendant answered by averring that he was induced to enter into the contract by reason of false and fraudulent representations made by the plaintiff to the effect that said lamp was in all respects practical, had been thoroughly tested, and other matters, showing that the invention was practical and valuable. The answer then proceeded to negative these statements by averring that the said lamp would not work; that it was not practical and that it could not be made to perform what the plaintiff had stated and represented it would do, and that it was wholly useless. This answer also contained an averment in the following language, after stating the representations made by the plaintiff, "that defendant's agent then tested said lamp thus exhibited, but it was immediately apparent that the illuminating jet was defective, seeing which, plaintiff declared that that difficulty was owing wholly to a defective burner, a statement which seemed probable, and which defendant's said agent believed to be true; that no further test was then made, nor was the same practical at any time, because it would require practical use of the lamp having sufficient length of time to determine, (*first*) that the illuminating jet could be controlled and adjusted according to said representation, and (*second*) if the lamp was satisfactory in other respects, then, if the valve itself and other apparatus would continue to perform its work when applied in practical use."

To this answer the plaintiff demurred as being insufficient upon its face to constitute a defense, and thereupon defendant served an

amended answer, which was held bad on demurrer, and leave was given to plead over. Thereupon the defendant served the present answer, omitting the counterclaim and also omitting the averment contained in the former pleading to the effect that a test had been made, but otherwise averring in substance and effect the false and fraudulent representations that the lamp had been thoroughly tested, been found safe and would work practically for the purposes for which it was intended, then averring the false character of such representations, that the defendant relied thereon, and that he would not have entered into the contract had he known of such defect.

The motion to strike out as sham was granted upon the ground that the defendant had deliberately suppressed the fact that a test had been made at the time false representations were made, in consequence of which the pleading was false. If the present answer averred matters which would constitute a defense to the action, then it could not be stricken out as sham, even though matter had been omitted therefrom which was material to the defendant, or of which only a part had been averred. The pleading, as served, avers a material representation as an inducing cause to the entering into the contract, viz., that the defendant represented that he had thoroughly tested the lamp and that it would work practically and was valuable. This was the inducing cause which prompted the defendant to enter into the engagement, and if it was false it would avoid the contract. The answer avers reliance on the representations and negatives their truthfulness. This, if proved, is a good defense, and under the pleadings the testimony is admissible. (*Publishing Co. v. S. S. Co.*, 148 N. Y. 39; *Farmers & Citizens' Bank v. Sherman*, 33 id. 69.)

Assuming, however, that the court was justified in examining the first pleading in order to determine whether there had been a deliberate suppression of a material fact which would render the answer sham, we think that such examination not only failed to disclose such fact, but that it also constituted matter of defense. What is therein called a test was a statement of what was done, and it appears from the entire allegation that it was insufficient in character for the defendant to determine whether any defect existed in the lamp or not. It is to be presumed that the defendant was with-

out information upon the subject and the plaintiff was possessed of full knowledge. When the lamp failed to work in the test to which it was then subjected, as averred in the pleading, the plaintiff attributed the defect to a cause quite independent of the practical working of the lamp and its valves. And if this be true, as we are bound to assume it was, then it necessarily follows that such statement and representation was as misleading and false as was the representation that the plaintiff had tested the lamp and that it would work practically. Instead, therefore, of being a test which would conclude the defendant from thereafter raising any question as to the falsity of the representations in respect thereto, it constituted an additional misrepresentation as misleading and damaging to the defendant as any other, and if established upon the trial would defeat a recovery for the royalties sought to be recovered in the action. In no view, therefore, was the court justified in striking out this answer as sham.

It follows that the order and judgment based thereon should be reversed and set aside, with costs and disbursements to the appellant.

VAN BRUNT, P. J., PATTERSON, INGRAHAM and LAUGHLIN, JJ., concurred.

Order and judgment reversed and set aside, with costs and disbursements to the appellant.

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THE UNION NATIONAL BANK OF LEWISBURG, PENNSYLVANIA, Appellant, v. MARY C. LEARY, as Administratrix, etc., of JAMES D. LEARY, Deceased, Respondent.

*Written contract of guaranty—when a consideration therefor is to be inferred from its terms.*

Under the Statute of Frauds, as it now exists, the consideration supporting a contract of guaranty must be expressed in the written contract or be fairly inferable therefrom.

In arriving at a correct construction of the written contract all of the facts and circumstances connected with its delivery, the reasons therefor and the purpose to be accomplished thereby may be shown by parol proof.

In an action brought by the Union National Bank of Lewisburg, Pennsylvania, to charge James D. Leary upon a contract of guaranty embraced in the fol-

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lowing letter written by Leary to one Himmelrich, the president of the plaintiff bank, "The Union Nat. Bank of Lewisburg, Pa., now holds two notes of The John Good Cordage & Machine Co. to the order of John Good, one for \$4,500 and one for \$2,500. I will be personally responsible for the payment of the two notes, with interest, within a reasonable time to The Union Nat'l Bk. of Lewisburg," it appeared that the guaranty was executed and delivered pursuant to an agreement, made between Leary and Himmelrich, by which each agreed to pay one-half of the amount of the notes and interest thereon and receive in payment therefor bonds of the John Good Cordage and Machine Company; that as a result of the execution and delivery of the guaranty, the plaintiff forbore, in reliance thereon, to enforce payment of the notes. *Held*, that the language of the instrument of guaranty fairly gave rise to the inference that the consideration for its execution was the agreement to forbear the enforcement of the notes for a reasonable time, and that such consideration was sufficient to support the guaranty.

INGRAHAM, J., dissented.

APPEAL by the plaintiff, The Union National Bank of Lewisburg, Pennsylvania, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of New York on the 21st day of March, 1902, upon the dismissal of the complaint at the close of the plaintiff's evidence on a trial at the New York Trial Term.

The action was originally brought against James D. Leary, but he having died during the pendency of the action, his administratrix was substituted as defendant in his stead.

*Clifford Wayne Hartridge*, for the appellant.

*Leopold Wallach* and *Alfred A. Cook*, for the respondent.

HATCH, J. :

The plaintiff brought this action to charge James D. Leary, deceased, with liability as a guarantor of payment of a certain promissory note, bearing date March 6, 1897, given by the John Good Cordage and Machine Company to John Good, and indorsed by the latter to the plaintiff in the action.

After judgment was rendered herein and on the 15th day of July, 1902, this action was revived and the above-named defendant, Mary C. Leary, as administratrix of James D. Leary, deceased, substituted in the place and stead of said defendant James D. Leary, who had theretofore died.

It is averred in the complaint that after the making and delivery of the note to the plaintiff, and on or about the 16th day of October, 1897, the defendant, in consideration of the plaintiff's extending the time of payment of the note, guaranteed its payment; that no part has been paid except the sum of \$190.62 interest thereon from January 5, 1898; that payment had been demanded by the plaintiff and that the defendant has refused to pay the same.

By the averments of the answer it is made to appear that the note in suit was given in payment for two other promissory notes executed by the Cordage and Machine Company for \$10,000 each on the 8th day of October, 1894; that said notes were subsequently taken up by payments thereon, and that two notes, one of \$4,500, the note in suit, and one for \$2,500, were given for the balance due and unpaid upon the two promissory notes of \$10,000 each. The note in suit was payable on demand. Sometime after its execution and delivery the plaintiff demanded payment of the maker, and thereupon James D. Leary, deceased, wrote and delivered to the plaintiff a letter which it is claimed constitutes a valid contract of guaranty and is the contract upon which this action is sought to be maintained against the defendant. The letter bears date October 16, 1897, is addressed to W. D. Himmelrich, president of the plaintiff, and is in the following language:

"The Union Nat. Bank of Lewisburg, Pa., now holds two notes of The John Good Cordage & Machine Co. to the order of John Good, one for \$4,500 and one for \$2,500. I will be personally responsible for the payment of the two notes, with interest, within a reasonable time to The Union Nat'l Bk. of Lewisburg.

"Respect. yours,

"JAMES D. LEARY."

Thereafter said Leary paid the \$2,500 note and the interest upon the note in suit, but refused upon demand to pay more, and thereupon this action was instituted. The answer, among other things, sets up the Statute of Frauds. A trial was had and at the close of the plaintiff's case a motion was made by the defendant to dismiss the complaint upon the ground that the contract of guaranty was void for failure to comply with the provisions of the statute; the particular infirmity being, as claimed, that no consideration was

expressed in the contract. This presents the only question in the case.

In the revision of the Statute of Frauds in 1830 there was inserted a provision that every contract thereunder must contain words "expressing the consideration." (2 R. S. 135, § 2.) The statute so remained in force until 1863. During that period the courts struggled with the question with varying results as to whether under the amendment it was permissible to imply or "spell out" an inference of consideration from the language used where it was not expressed in terms. (*Church v. Brown*, 21 N. Y. 315.) These words of the statute were omitted by an amendment in 1863 (Chap. 464). Thereunder it was held that by virtue of the amendment it was no longer necessary that a contract of guaranty should express the consideration, either expressly or by inference, and that it could be proved by evidence *aliunde* the instrument. (*Speyers v. Lambert*, 1 Sweeney, 335.)

The Supreme Court, however, in *Castle v. Beardsley* (10 Hun, 343), refused to adopt this construction of the statute, holding, in a well-considered opinion by TALCOTT, J., that the effect of the amendment of 1863 was to substantially restore the statute as it had existed from the time of Charles II; that the construction to be given was such as had obtained prior to the amendment, which construction required the consideration to be expressed in words, or be fairly inferable therefrom. This doctrine was approved by the Court of Appeals, and has been uniformly followed since that time. (*Barney v. Forbes*, 118 N. Y. 580, and cases cited; *Brumm v. Gilbert*, 50 App. Div. 430.)

Nothing contained in *Bradt v. Krank* (164 N. Y. 515) conflicts with these decisions. Its statement is to be construed in connection with the prior determination of the Court of Appeals, and the settled rule of law upon that subject. Therein it was held that the consideration must exist and be proved before a recovery could be had. This simply announced the doctrine which had before obtained. The court held that the instrument there under consideration and the circumstances attending its execution and delivery were sufficient to justify the court to infer from the instrument itself a consideration for the promise. In arriving at a correct construction of the instrument all of the facts and circumstances connected with its



delivery, the reasons therefor, and the purpose to be accomplished may be shown by oral proof. (*Coe v. Tough*, 116 N. Y. 273; *Barney v. Forbes*, *supra*.) Applying this rule of law to the instrument in question, it appears by the answer of the defendant that an agreement was made between James D. Leary, deceased, and Himmelrich, that each would pay one-half of the amount of the notes and interest thereon and receive in payment therefor bonds of the John Good Cordage and Machine Company, and that thereafter the said James D. Leary, deceased, paid the note of \$2,500 and interest and interest on the note for \$4,500 to the 5th day of January, 1898. It was disclosed by the proof that pursuant to this arrangement the guaranty in question was executed and delivered. The proof also disclosed that, as a result of the execution and delivery of the guaranty, the plaintiff forbore, in consideration thereof, the enforcement of payment of the note and held the same, relying upon the guaranty. The language of the guaranty contemplates that such would be the result of its execution and delivery. The promise is not to pay at once, but within a reasonable time, and in order to give force and effect to such language an extension of time was necessary for a reasonable period, and that both parties so understood this to be the effect of the agreement is made evident by this fact that the plaintiff forbore to collect, and the deceased, acting upon the liability which he had assumed, subsequently paid one note and interest upon the other. The language of the instrument of guaranty, therefore, fairly gives rise to the inference that the consideration for its execution was the agreement to forbear the enforcement of the notes for a reasonable time. That such an agreement furnishes a sufficient consideration to establish liability under a guaranty is settled by authority. (*Strong v. Sheffield*, 144 N. Y. 392; *Porter v. Thom*, 30 App. Div. 363; *Greene v. Odell*, 43 id. 494.)

In this view of the case, it necessarily follows that a cause of action against the said defendant James D. Leary, deceased, was established. It was, therefore, error to dismiss the complaint.

The judgment should be reversed and a new trial granted, with costs to the appellant to abide the event.

VAN BRUNT, P. J., O'BRIEN and McLAUGHLIN, JJ., concurred; INGRAHAM, J., dissented.

INGRAHAM, J. (dissenting):

I agree with Mr. Justice HATCH as to the legal rules applicable to the determination of this question, but dissent from his conclusion that the language of the instrument of guaranty gives rise to the inference that the consideration for its execution was an agreement to forbear the enforcement of the notes for a reasonable time. In the first place, there was no proof of such an agreement. When this guaranty was given the notes were due and the plaintiff could have proceeded against those liable upon them to collect the amount due. Himmelrich, to whom the letter guaranteeing the payments of the notes was written, was the president of the plaintiff, and it seems to have been the object of the defendant's intestate to protect him from blame, because he, as president of the bank, had discounted these notes. There had been an understanding between Leary, the defendant's intestate, and Himmelrich that each was to pay one-half of these notes to the bank, but I can find no evidence to justify a finding that there was any agreement between the plaintiff and either Leary or Himmelrich to suspend the right to enforce these notes, or that the plaintiff did suspend the collection of the notes upon this promise. By this instrument of guaranty Leary agreed that he would be responsible for the debt of another which was then due and payable to the plaintiff. There was no proposal in the letter of guaranty that the bank should suspend the collection of the notes which were accepted by the bank; nothing but the naked promise to pay the notes within a reasonable time, and if there is any force in the rule, which I understand is conceded to be established in this State, that an instrument of guaranty must contain, either expressly or inferentially, a consideration, it seems to me that this instrument fails to comply with the statute and is void.

I think the judgment should be affirmed.

Judgment reversed, new trial ordered, costs to appellant to abide event.

JOHN E. HUNT, Appellant and Respondent, v. PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY OF NEW YORK, Respondent and Appellant.

*Life insurance — action by the insured to reform the policy and to recover its surrender value as reformed — he acts as trustee for the beneficiary — right of an assignee of the beneficiary, after the death of the insured, to be substituted as plaintiff and to serve a supplemental complaint asking for the reformation of the policy and the recovery of the amount thereby secured to be paid.*

The complaint in an action brought by William Wilkinson against an insurance company alleged that, in 1891, the defendant issued an insurance policy to him, and represented that such policy provided for a fixed rate of premium, payable quarterly; that in December, 1898, the defendant sent the plaintiff a notice demanding payment of a much larger premium than he had theretofore paid; that the plaintiff had then reached the age of sixty-seven years, and that it was impossible for him to obtain insurance upon his life in any reputable insurance company, except at a greatly increased rate of premium.

The relief demanded was that the policy of insurance should be reformed, if it should be determined that the defendant was, by its terms, entitled to demand payment of premiums at an increasing rate, or that the policy be construed to be a level rate policy, not subject to an increasing premium; that the defendant be required to accept the premium at the level rate, as paid when the policy was first issued, for the remainder of the life of the insured; that the plaintiff recover the value of the policy as reformed, and that he have such other and further relief as to the court might seem just and equitable.

The policy in question designated Wilkinson's three sons as the beneficiaries thereof, and, at the time the action was brought, such beneficiaries had assigned all their interest in it to Rebecca Wilkinson. After the defendant had answered and the case was ready for trial, Wilkinson died. His wife, Rebecca Wilkinson, filed with the defendant proof of the death of the insured, and subsequently assigned to one John E. Hunt all of her claim under the policy of insurance and all her right, title and interest in the cause of action then pending. Thereupon Hunt made a motion for an order reviving the action and substituting him as plaintiff in the place and stead of said Wilkinson, and also for leave to serve a supplemental complaint setting up the facts in relation to Wilkinson's death and the assignment to him of the cause of action, and asking therein for judgment that the policy be declared to be a level rate policy according to its terms, and that the plaintiff recover judgment thereon for the sum of \$10,000, which was the whole amount secured to be paid thereby in the event of Wilkinson's death.

**Held**, that Wilkinson stood, in relation to his wife, as the trustee of an express trust, within the provisions of section 449 of the Code of Civil Procedure, and that, as such, the action was properly brought in his name;

That Hunt, having succeeded to the entire claim by virtue of his assignment, was entitled to be substituted as the party plaintiff either under section 756 or section 757 of the Code of Civil Procedure;

That Hunt should be permitted to serve the supplemental complaint;

That the fact that such complaint demanded a reformation of the policy and also sought to recover the sum secured to be paid thereby did not render it objectionable;

That it could not be successfully urged, because the money judgment demanded by the proposed supplemental complaint was the amount secured to be paid by the policy in the event of Wilkinson's death, while the money judgment demanded in the original complaint was only for the surrender value of the policy, that the purpose of the proposed supplemental complaint was to set up a new and totally different cause of action from that averred in the original complaint;

That the cause of action under both complaints remained the same and that the extent of recovery was alone modified.

VAN BRUNT, P. J., dissented.

APPEAL by the plaintiff, John E. Hunt, from so much of an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 9th day of September, 1902, as denies the plaintiff's motion for leave to serve a supplemental complaint setting up the death of the former plaintiff, William Wilkinson, and asking for further damages.

Also an appeal by the defendant, the Provident Savings Life Assurance Society of New York, from so much of said order as substitutes the said John E. Hunt as plaintiff in the action in the place and stead of William Wilkinson, deceased, and revives and continues the action in the name of such substituted plaintiff.

*A. Delos Kneeland*, for the plaintiff.

*R. B. Aldcroft, Jr.*, for the defendant.

HATCH, J. :

This is an equitable action commenced by William Wilkinson, now deceased, by the service of a summons and complaint on or about the 27th day of October, 1899, for the purpose of obtaining a reformation of a policy of life insurance issued by the defendant upon the life of Wilkinson, and to recover the value of the policy as reformed ; also to obtain an accounting for premiums paid, and

for such other relief as the facts should warrant. It appeared by the complaint in the action served by Wilkinson that he had been insured by the defendant corporation and held a policy therein, in which the premiums required to be paid increased in amount at irregular intervals as the age of the insured increased. In July, 1891, he applied to the defendant to surrender such policy and obtain instead thereof a new policy, under which the premiums would fall due at regular intervals and should not increase in amount. Negotiations were had to that end between the assured and the agent of the defendant, resulting in an agreement upon the part of the defendant to issue to the assured a policy in place of the one then held by him, at a level rate premium which should not increase or vary during the life of the assured. After such negotiations and agreement, the assured surrendered to the defendant the policy then held by him, and received in place thereof a new policy which was represented by the officers and agents of the defendant to be on the level rate plan, with fixed premiums payable quarterly. For about seven and one-half years after the delivery of this policy the assured paid to the defendant a fixed rate of premium in regular quarterly installments. In December, 1898, the defendant sent to the assured a notice demanding a premium largely in excess of the premiums theretofore paid upon the last policy. Before the premium thus demanded became due, the assured tendered to the defendant the amount of premium theretofore paid upon the policy at the level rate; but the defendant refused to receive the same and insisted upon the payment of premiums as demanded in its notice. The assured had then reached the age of sixty-seven years, and it was impossible for him to obtain insurance upon his life in any reputable insurance company, except at a greatly increased rate of premium. Thereupon he brought this action, asking for a reformation of the policy of insurance, if it should be determined that in and by its terms the defendant was entitled to demand and receive the payment of premiums at an increased and increasing rate, or that the policy be construed and held to be a level rate policy not subject to an increasing premium, in accordance with the agreement of the parties as made at the time of the surrender of the first policy; that the defendant be required to accept the premium at the level rate, as paid, when the

policy was first issued, for the remainder of the life of the assured; that he recover the value of the policy as reformed, and for such other and further relief as to the court might seem just and equitable.

Under the policy, the subject of this action, the plaintiff's three sons were named as the beneficiaries therein. By an assignment in writing under date of February 18, 1897, and filed with the defendant, the three beneficiaries transferred all their interest therein to Rebecca Wilkinson, the wife of the assured. The defendant answered, denying the material allegations of the complaint and alleging that by reason of the assignment to Rebecca Wilkinson, the wife of the plaintiff, her husband was not the real party in interest, and that, as the holder and owner of the policy, she was the only party in interest. The answer further averred an agreement of settlement, and set up a counterclaim, praying for a specific performance of such agreement and for other and further relief. The plaintiff served a reply to the counterclaim; the issues were noticed for trial, and the cause placed upon the calendar. Before the case was reached for trial, and on September 3, 1900, the plaintiff died. Thereafter Rebecca Wilkinson filed with the defendant proof of the death of the assured, and in December, 1901, assigned to John E. Hunt, the substituted plaintiff, all of her claim under the policy of insurance and all of her right, title and interest in the cause of action then pending thereon.

On June 9, 1902, the assignee, Hunt, moved at Special Term, on notice, for an order reviving the action and substituting him as plaintiff in the place and stead of said Wilkinson; asking that the summons and pleadings in the action be amended accordingly, and also for leave to serve a supplemental complaint setting up facts in relation to the death of William Wilkinson and the assignment to him of the cause of action, and asking therein for judgment that the policy be declared to be a level rate policy according to its terms and conditions, and that the plaintiff recover judgment thereon for the sum of \$10,000 with interest and costs. The court granted the motion to the extent of substituting Hunt as plaintiff in the action and continuing the same in his name, but denied leave to serve the proposed supplemental complaint. From so much of the order as denied leave to serve the supplemental complaint, the plain-

tiff has appealed; and from the order permitting Hunt to be substituted as plaintiff, continuing the action in his name and amending the pleadings accordingly, the defendant has appealed.

The action, as originally brought by Wilkinson, was properly brought in his name, even though he could never have any beneficial interest in the proceeds of the policy. He stood in relation to his wife as the trustee of an express trust, within the provisions of section 449 of the Code of Civil Procedure, and as such had a standing to maintain the action. (*Kerr v. Union Mutual Life Ins. Co.*, 69 Hun, 393.) And Hunt, as the successor in interest, is properly authorized to continue the action. (*Hale v. Shannon*, 58 App. Div. 247.) So far as the substituted plaintiff is merely the successor to the cause of action set up in the original complaint, he is entitled to be substituted as party plaintiff by virtue of section 757 of the Code of Civil Procedure. If it should be held that he took no interest therein as the successor in interest of Wilkinson or his wife, nevertheless, he holds as assignee the entire claim and succeeds to all rights and interests therein by virtue of his assignment, and would, therefore, be properly substituted as the plaintiff in the action by virtue of the provisions of section 756 of the Code. It is evident, therefore, that the plaintiff, no matter how his status be viewed, had the right to be substituted as plaintiff in the action and to prosecute the same to judgment for the relief demanded. The order to this extent will, therefore, be sustained.

We are also of opinion that the substituted plaintiff should have been permitted to serve the supplemental pleading, as he is entitled to have such equitable relief in the action as his proofs establish and also to recover the full amount secured by the terms of the policy if the liability of the defendant be established to exist thereunder. It is no objection to the complaint or to the right of recovery that it demands a reformation of the instrument which is the subject of the action and also asks to recover the sum secured to be paid thereunder. It is well established that a plaintiff is entitled to maintain such an action for such relief. (*McCoubrey v. St. Paul F. & M. Ins. Co.*, 50 App. Div. 416; *affd.* on appeal, 169 N. Y. 590.)

Leave to serve the supplemental complaint seems to have been denied by the learned court below upon the ground that it was sought to inject a claim into the action which could not have been

asserted by the original plaintiff and to set up a new and totally different cause of action from that averred in the original complaint. It is evident that this ground is untenable. It is to be observed that the action as originally commenced was equitable in its character. It not only sought to obtain a reformation of the contract of insurance, but it also asked that the plaintiff be awarded damages thereunder, and that he recover the amount of the surrender value of the policy. This cause of action continues to exist; the supplemental complaint simply seeks to plead the new facts which have arisen affecting the transaction since the action was commenced. All of the facts sought to be set up in the supplemental complaint are connected with and directly arise out of the contract between the assured and the defendant; and the right of recovery in the substituted plaintiff, if his proof shows it to exist, is based entirely upon such contract. The action in no sense ceases to be an equitable action. The substituted plaintiff stands upon his right to a reformation of the policy of insurance. The right to recover the whole amount of the sum secured to be paid by its terms is based upon the contingency for which it provided, to wit, the death of the assured. The character of the relief demanded is not other or different, except in degree, from the character of the relief demanded by the assured in his action. Therein he asked for reformation and a money judgment. In the proposed supplemental complaint the same reformation is asked and a money judgment is demanded. The amount of the latter demand is increased, but that does not change the character of the action from what it was before. The assured demanded the recovery of a money judgment, based upon a breach of contract by the defendant, and such recovery, by virtue of the terms of the contract, was all he was entitled to recover at that time. Upon his death, such right was immediately enlarged, but was not changed—the right to recover it in each instance being based upon the terms of the contract. Consequently, the cause of action under the proposed supplemental complaint remains the same; the degree of recovery alone may be modified. It is a well-settled equitable rule that where a cause of action in equity exists, and a proper action is brought to assert such right, the court will continue to exercise its jurisdiction over the same and administer relief thereunder to the end of the case,



upon the facts as they exist at the termination of the litigation. (*Peck v. Goodberlett*, 109 N. Y. 180; *Pond v. Harwood*, 139 id. 111, 120.)

In the case relied upon by the court below (*Lindenheim v. N. Y. Elevated R. R. Co.*, 28 App. Div. 170) the whole nature of the action was sought to be changed from an action at law, and one triable by a jury, to an action in equity to obtain an injunction. Under such circumstances it was properly held that a supplemental pleading was not permissible which worked such a result. *Bush v. O'Brien* (58 App. Div. 118), relied upon by the defendant, illustrates the rule in a different form. The cause of action therein attempted to be set up by the supplemental pleading did not exist when the action was brought. It averred a cause of action based upon an entirely different provision of law not involved in the first action, against other parties, not then in existence nor affected by it, and was based upon a different state of facts. It was properly held that it was a new cause of action. All the cases relied upon by the defendant and the learned court below fall within the principles announced in the last two cases. They are all without application here, for reasons already stated. The facts in this case bring it clearly within the provisions of section 544 of the Code of Civil Procedure, and the supplemental pleading was, therefore, authorized.

It follows that the order of substitution should be affirmed, and that part of the order denying leave to serve a supplemental complaint should be reversed, with ten dollars costs and disbursements, and the motion granted, with ten dollars costs to the plaintiff.

O'BRIEN, INGRAHAM and McLAUGHLIN, JJ., concurred; VAN BRUNT, P. J., dissented.

Order of substitution affirmed, and that part of order denying leave to serve supplemental complaint reversed, with ten dollars costs and disbursements, and motion granted, with ten dollars costs to plaintiff.

In the Matter of the Judicial Settlement of the Account of MARY E. FITZSIMONS, as Administratrix de bonis non of ANN CASSIDY, Deceased, Appellant.

77	845
r174 NY	15
77	345
r174 NY	15

L. NEWTON WILLIAMS, Attorney for MICHAEL McNALLY, Individually, and for MICHAEL McNALLY and WILLIAM HARRIGAN, as Administrators, etc., of JOHN P. McNALLY, Deceased, Respondent.

*Champerty*—agreement by an attorney to pay out of his compensation a debt of the client—agreement by an attorney to pay costs—unconscionable contract.

A provision in an attorney's contract of retainer, by which the attorney agrees to pay out of the compensation to be paid to him pursuant to the contract all moneys due from the client to his former attorney, renders the contract champertous under section 74 of the Code of Civil Procedure.

An agreement by which an attorney at law retained to protect the interests of a person entitled to a one-third interest in a decedent's estate, which is large, on the judicial settlement of the administrator's accounts, is to receive as compensation for his services fifty per cent of the moneys which his client receives from the estate, is unconscionable, and where the client effects a settlement of the controversy without the consent of the attorney, the court will not permit the attorney to defeat the settlement, but will relegate him to his remedy against the client.

*Semble*, that a provision in an attorney's contract of retainer, by which the attorney agrees to pay the costs of the litigation, renders the contract void.

APPEAL by Mary E. Fitzsimons, as administratrix de bonis non of Ann Cassidy, deceased, from an order of the Surrogate's Court of New York county, entered in said Surrogate's Court on the 7th day of July, 1902, denying the motion of said administratrix for an order withdrawing the objections of Michael McNally, individually and as administrator, etc., of John P. McNally, deceased, to the account of Mary E. Fitzsimons, as administratrix of Ann Cassidy, deceased.

Ann Cassidy died in August, 1897, leaving property real and personal. The heirs surviving were Peter A. Cassidy, a brother, Mary E. Fitzsimons, a sister, and John P. McNally a nephew, each entitled to one-third of her estate. The last named was a lunatic who for several years before his aunt's death was confined in an asylum. Peter A. Cassidy the brother, was appointed administrator of the estate of Ann Cassidy, deceased, and after his appointment died, and the said Mary E. Fitzsimons was appointed in his place

administratrix *de bonis non*. After this last appointment, John P. McNally died in the asylum, leaving as his only next of kin his father, Michael McNally; and the latter with one William Harrigan were appointed administrators of the estate of John P. McNally, deceased. As such administrators they commenced proceedings in the Surrogate's Court to compel Mary E. Fitzsimons to render an account as administratrix, which resulted in an order requiring her to file such an account, to which, when filed, objections were made by Michael McNally, as administrator and individually. Thereafter the account and objections were sent to a referee and while the matter was there pending, McNally withdrew his objections and consented that the account be settled and allowed as filed. He also executed a general release to Mary E. Fitzsimons of all claims against the estate of Ann Cassidy.

The administratrix then made a motion before the referee, based on the release and consent, for a report approving the account, which motion was opposed by I. Newton Williams, the attorney for McNally, who was also attorney for McNally and Harrigan, as administrators, on the ground that he had a lien on the fund which McNally could not release or settle. In opposing the motion he introduced an agreement dated July 21st, 1901, upon which the alleged lien was based and which provided, so far as it is necessary to be considered upon this appeal, that he was to be paid "as full compensation for his services, one-half of any and all property both real and personal, which the said Michael McNally inherited," and that the latter for that purpose conveyed and assigned and set over to him, or his assigns, "one-half of all property both real and personal, which he, the said Michael McNally, has inherited, has received or will receive as an heir at law or otherwise, in and to the said estate of Ann Cassidy and Patrick Cassidy her father, or which he is entitled to by virtue of his right of curtesy in and to any lands inherited by his wife," and that the said Williams accepts the said employment and "agrees to pay out of his compensation any and all claims or charges which Mr. Robert S. Pelletreau may have against the said Michael McNally."

The referee refused to grant the motion on the ground of want of power, and thereafter it was made before the surrogate, who denied it, and from the order thus entered this appeal is taken.

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App. Div.] FIRST DEPARTMENT, DECEMBER TERM, 1902.

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*Bayard L. Peck*, for the appellant.

*I. Newton Williams*, for the respondent.

O'BRIEN, J. :

The extent of an attorney's lien and its bearing upon the legal rights of a client to settle an action or special proceeding without the attorney's consent, we deem it unnecessary to pass upon, in view of the conclusion at which we have arrived with respect to the validity of the agreement upon which the alleged lien is based. The consideration for the fifty per cent interest which the attorney was to obtain in McNally's share of the estate, both individually and as administrator, was the obligation on the part of the attorney to prosecute the action and "to pay out of his compensation any and all claims or charges which Mr. Robert S. Pelletreau may have against the said Michael McNally as heretofore agreed upon." It appears that the gentleman named was the former attorney of McNally, who had rendered services and continued to do so in conjunction with Mr. Williams after the latter's retainer under the agreement set forth. A part of the consideration, therefore, underlying the agreement was the promise by Mr. Williams to pay out of his own compensation whatever was due or should become due to Mr. Pelletreau for legal services and discharge McNally from all liability to said Pelletreau.

In addition, therefore, to the legal services to be rendered by Mr. Williams, we have as an inducement for the conduct of the litigation by him and for the agreement executed by McNally, the discharge of the latter from all liability to Pelletreau and the assumption by Mr. Williams of whatever debt was then due or that might become due to Pelletreau. Although there is no express language in the agreement by which Mr. Williams is to pay the costs and disbursements that might be incurred in the litigation, it is significant that the agreement does not expressly impose that obligation on McNally. Had it appeared or could it be legally inferred that the obligation to pay the same rested upon the attorney, this, under the authorities, would have rendered the agreement void. (*Rossman v. Seaver*, 41 App. Div. 603; *Brotherson v. Consalus*, 26 How. Pr. 213.)

The question remains, however, whether the provision exonerating the defendant McNally from all obligations to his former attor-

ney and the provision by which Mr. Williams agrees to discharge whatever is due or might accrue to such attorney, renders the agreement void. By section 74 of the Code of Civil Procedure it is provided: "An attorney or counsellor shall not by himself or by or in the name of another person, either before or after action brought, promise or give or procure to be promised or given a valuable consideration to any person as an inducement to placing or in consideration of having placed in his hands, or in the hands of another person, a demand of any kind for the purpose of bringing an action thereon. But this section does not apply to an agreement between attorneys and counsellors or either to divide between themselves the compensation to be received." After quoting this section, it was said in reference thereto in *Oishei v. Lazzarone* (40 N. Y. St. Repr. 660, 662): "That no cause of action can arise out of a transaction thus prohibited by statute is such a plain proposition as hardly to require the citation of authority to support it. But such authority may be found in *Baldwin v. Latson* (2 Barb. Ch. 306); *Wetmore v. Hegeman* (88 N. Y. 73); *Browning v. Marvin* (100 id. 144)."

Section 74 in express terms permits an agreement between attorneys to divide the compensation to be received; but in this case the agreement was not between the attorneys, but was one between a client and one attorney by which the latter agreed to discharge the obligation of the client as an inducement to and a consideration for his retainer. We have not had brought to our attention any judicial determination of the exact meaning to be ascribed to the words "valuable consideration" as used in section 74 of the Code, but, we think it requires no extended argument to demonstrate that an agreement to pay the debt of another to a third person is a valuable consideration. If the attorney had contracted to pay a given sum for the discharge of the former attorney's claim, without regard to the sources from which it was to be received, it would constitute an agreement to pay money in consideration of the retainer, and would be in every sense of the word a valuable consideration for procuring himself to be retained. The source from which the money is to come cannot change the fact. Whether the consideration be paid out of the money which he is to receive from the transaction or independent of it, is not of consequence; the fact remains that the money which he uses pays this indebtedness and is aside of the serv-

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App. Div.] FIRST DEPARTMENT, DECEMBER TERM, 1902.

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ices which the attorney is to render, and it makes no difference from which particular fund he pays the money; it is none the less his money, and none the less a consideration, even though he take it from the portion which he is to receive as a result of the litigation. This feature, we think, renders the agreement champertous.

There is another vice inherent in this agreement which renders it unenforcible. In consideration of what the attorney is to do, the client is induced to enter into an agreement by the terms of which he is to pay over to the attorney as his compensation one-half of his interest in what is stated to be a large estate. Such an agreement, upon its face, seems to us to be unconscionable. We have not overlooked the language of section 66 of the Code of Civil Procedure, which provides that an attorney has a lien upon his client's cause of action, and says that "the compensation of an attorney or counsellor for his services is governed by agreement, express or implied, which is not restrained by law." By this agreement the attorney is to receive as compensation fifty per cent of what the client shall obtain as his interest in the estate involved in the proceeding. We are aware that of late the payment of large fees has been sanctioned by courts, but no case has been brought to our attention which has gone to the extent of upholding a fee of one-half the client's cause of action, and now that the question is squarely presented whether such an agreement is conscionable, we think it would not be in the interest of public policy or professional ethics to place the seal of approval upon it.

The question which we are considering was to some extent involved in *Coughlin v. New York Central & H. R. R. Co.* (71 N. Y. 450), which was a negligence case where an attorney had an agreement for a contingent fee of fifty per cent, and wherein the question of allowing him to enforce his lien as an attorney under such an agreement was considered. It was therein held that the lien of the attorney did not attach and could not be enforced because the action for negligence was not in its nature assignable, but in the course of the opinion it was said: "Still, an agreement to divide the recovery in such a case would attach itself to the judgment when recovered, and give the attorney an equitable interest therein." Two comments, however, are necessary with reference to that decision. One is, that the question of the validity of the agreement was not considered,

the attorney having been denied relief upon another ground, and the language quoted, therefore, was *obiter dicta*. The second is, that giving to the language used its most extended meaning and effect, it would have no application to an agreement such as this, wherein the client's interest is fixed and determined and the controversy is confined principally to the amount which he is to receive. Here it is alleged that the estate to be divided is a large one, consisting of both real and personal property, in which the client who made the agreement had an undoubted interest of one-third.

As said in *Brotherson v. Consalus* (*supra*): "While the relation of attorney and client continues the court will carefully scrutinize the dealings and contracts between them and guard the client's rights against every attempt by the attorney to secure an advantage to himself at the expense of the client. Nor is it necessary in such case for the client to show actual \* \* \* fraud in order to obtain relief, but the law will presume in his favor so soon as the confidential relation is shown to have existed at the time of the transaction complained of. This rule has its foundation on principles of public policy and is adhered to by the courts with the utmost rigor." (Story's Eq. Jur., §§ 308-324; *Starr v. Vanderheyden*, 9 Johns. 253; *Seymour v. Delancy*, 3 Cow. 527; *Lansing v. Russell*, 13 Barb. 524; *Bergen v. Udall*, 31 id. 9; *Evans v. Ellis*, 5 Denio, 640; *Wendell v. Van Rensselaer*, 1 Johns. Ch. 344; *Howell v. Ransom*, 11 Paige, 538; *Dent v. Bennett*, 7 Simons, 539; *Holman v. Loynes*, 27 Eng. Law & Eq. 168; *Ford v. Harrington*, 16 N. Y. 285; *Sears v. Shafer*, 6 id. 272.)

In Story's Equity Jurisprudence it was said (Vol. 1, § 311 *et seq.*): "As to the relation of client and attorney \* \* \* the law with a wise providence not only watches over all the transactions of parties in this predicament, but often interposes to declare transactions void which between other persons would be held unobjectionable. \* \* \* The burthen of establishing its perfect fairness, adequacy and equity is thrown upon the attorney upon the general rule that he who bargains in a matter of advantage with a person placing a confidence in him is bound to show that a reasonable use has been made of that confidence; a rule applying equally to all persons standing in confidential relations with each other." So in *Ford v. Harrington* (16 N. Y. 285) it was held, where an attorney

had procured a conveyance of land, that although the law would not relieve either party against the other where they stood upon an equal footing, yet the rule prohibiting an attorney from obtaining any advantage in a transaction with his client must prevail.

Our conclusion is that the agreement here in question should not be sanctioned or enforced as against the representatives of the estate who are strangers to it and who would be put to trouble and expense in preventing litigation as against them based upon it. Upon the ground, therefore, that the agreement is unconscionable and is one that the court should not sanction or enforce, we think that the motion before the surrogate should have been granted, leaving the attorney to his remedy as against the client to obtain just compensation for the services rendered.

The order accordingly should be reversed, with ten dollars costs and disbursements, and the motion granted, with ten dollars costs.

VAN BRUNT, P. J., INGRAHAM, McLAUGHLIN and HATCH, JJ., concurred.

Order reversed, with ten dollars costs and disbursements, and motion granted, with ten dollars costs.

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In the Matter of the Application of the BOARD OF PUBLIC IMPROVEMENTS OF THE CITY OF NEW YORK, by the Corporation Counsel, Relative to Acquiring Title by the City of New York for the Use of the Public to Certain Lands on the Northerly Side of Fifty-ninth Street and the Southerly Side of Sixtieth Street, etc., as a Site for the Construction and Permanent Location of a Suspension Bridge over the East River, between the Boroughs of Manhattan and Queens, Known as Bridge No. 4.

THE CITY OF NEW YORK, Appellant; ALFRED M. DOWNES, Respondent.

*Commission to condemn land in New York city — the clerks thereof are to be furnished by the corporation counsel.*

Section 1 of chapter 393 of the Laws of 1896, making it the duty of the corporation counsel of the city of New York to furnish the necessary clerks to commissioners appointed in condemnation proceedings instituted on behalf of the city, was not repealed, either expressly or impliedly, by the Greater New York



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charter (Laws of 1897, chap. 878) and is still in force. Consequently, commissioners of estimate and assessment appointed in a proceeding instituted by the city of New York to acquire title to certain lands for the construction of East River Bridge No. 4 had no power to appoint a clerk to perform the clerical work of the commission, and a clerk so appointed by them is not entitled to enforce payment of his fees from the city.

APPEAL by The City of New York from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 21st day of August, 1902, taxing the bill of expenses of Alfred M. Downes, the clerk appointed by the commissioners, at the sum of \$250 per month for two months.

*Theodore Connolly*, for the appellant.

*Thomas E. Rush*, for the respondent.

INGRAHAM, J. :

This proceeding was instituted by the city of New York to acquire title to certain lands for the construction of the East River Bridge No. 4. The corporation counsel supplied to the commission a clerk to perform the clerical work of the commission who was paid a regular salary by the city. The commission, however, appointed the respondent clerk to the commission at a salary of \$250 per month. The chairman of the commission subsequently certified that the reasonable value of the services of the respondent was \$500, and the court in this proceeding has taxed the bill of the clerk appointed by the commission at that sum for the services performed between the 29th day of April, 1902, and the 29th day of June, 1902, inclusive. Counsel for the city insisted that the commissioners had no power to appoint a clerk, but that the law requires the corporation counsel to furnish such clerks as are needed by the commission, and that he had furnished a clerk as required. By section 1 of chapter 393 of the Laws of 1896 it is provided that "in all proceedings \* \* \* which may hereafter be instituted for the acquisition of any right, title or interest in any property for public purposes by the city of New York \* \* \* it shall be the duty of the counsel to the corporation to furnish to the commissioners of estimate and assessment or commissioners of appraisal or such other commissioners as may have been or may be appointed

in any such proceeding wherein clerks and surveyors have not already been appointed, such necessary clerks, surveyors and other employes, and to provide such suitable offices as they may require to enable them to fully and satisfactorily discharge the duties imposed upon them." This provision was not expressly repealed by the New York charter of 1897 (Laws of 1897, chap. 378), but the respondent claims that it was repealed by implication. Section 1447 of that charter provides that "the amounts of the awards made in a proceeding brought under this chapter for the value of lands and interests therein taken hereunder shall be paid out of the fund created by the act authorizing the acquirement of the said lands or interests therein, and the money for the payment thereof, together with the fees of the commissioners of estimate, the compensation of such necessary clerks or assistants as they may employ, and all other necessary expenses in and about the special proceeding instituted under this chapter, including the fees of counsel employed by the corporation counsel in the proceeding and all other reasonable expenses incurred by said corporation counsel in the conduct of said proceeding, shall be also paid out of the said fund so provided." By section 1608 of the charter the provisions of the Consolidation Act were only repealed "so far as any provisions thereof are inconsistent with the provisions of this act, \* \* \* and no further," and section 1609 provides that "the mere omission from this act of any previous acts or of any of the provisions thereof, including said consolidation act of eighteen hundred and eighty-two, relating to or affecting the municipal and public corporations or any of them which are herein united and consolidated, shall not be held to be a repeal thereof." We think that, under these provisions, section 1 of the act of 1896 was still in force. By the act of 1896 it was made the duty of the counsel to the corporation to furnish to the commissioners of estimate and assessment, or the commissioners of appraisal, "such necessary clerks, surveyors and other employes;" and nothing in the charter expressly repeals this provision, and the mere fact that it was not repeated in the charter could not be held to be a repeal thereof. The provision (§ 1447) requiring the payment of the fees of the commission, the compensation of such necessary clerks or assistants as they may employ, and the other neces-

sary expenses of proceedings, out of a certain fund provided for the payment of the awards for lands taken, is not at all inconsistent with the provision that the clerks that they appoint are to be the clerks furnished by the counsel to the corporation under the provisions of the act of 1896. We do not think that it was the intention of the Legislature to repeal the act that provided that the clerks required to perform the clerical work of the commission should be furnished by the corporation counsel, rather than that independent clerks should be appointed by the commissioners, which would increase the cost of these proceedings, now extremely burdensome to the city and the property owners. This construction we think, is justified by the case of *People ex rel. Pumpyanisky v. Keating* (168 N. Y. 390). That it was the intention of the Legislature to continue this restriction upon the power of these commissioners to appoint clerks appears from the provisions of the revised charter (Laws of 1901, chap. 466), which went into effect on the 1st of January, 1902. By section 1446 of that act it is made the duty of the comptroller of the city of New York to furnish the commissioners of estimate and appraisal who may be appointed such necessary clerks and other employees as they may require to enable them fully and satisfactorily to discharge the duties imposed upon them; and although this provision may not apply, as by section 1448 it is provided that the provisions of the chapter shall not apply to any proceeding instituted prior to the time of the taking effect of the act, it is a legislative declaration that the commissioners were not to appoint independent clerks for the performance of these duties.

My conclusion is that the commissioners had no power to appoint the respondent and that he is not entitled to enforce payment of his fees from the city.

It follows that the order appealed from must be reversed, with ten dollars costs and disbursements, and the motion denied, with ten dollars costs.

VAN BRUNT, P. J., PATTERSON, HATCH and LAUGHLIN, JJ., concurred.

Order reversed, with ten dollars costs and disbursements, and motion denied, with ten dollars costs.

In the Matter of the Transfer Tax upon the Estate of THEODORE HELLMAN, Deceased.

FRANCES HELLMAN and ISAAC N. SELIGMAN, as Executors, etc., of THEODORE HELLMAN, Deceased, Appellants; NATHAN L. MILLER, as Comptroller of the State of New York, Respondent.

77	855
89	Mis 617
77	355
174	NY 254
40	Mis 510

*Transfer tax — the right acquired by the legal representatives of a decedent in a Stock Exchange seat held by him is not subject thereto.*

The right to a seat in the New York Stock Exchange, which belonged to a decedent during his lifetime and which passed to his personal representatives at his death, is not subject to a transfer tax under sections 220 and 221 of the Tax Law, as such a right is not "personal property" within the meaning of that term as defined by subdivision 5 of section 2 of the Tax Law.

All that passes to the decedent's personal representatives in such a case is the right to a transfer of the decedent's seat subject to the rules of the Stock Exchange, and not the capital invested in the purchase of the seat or the value thereof at the time of the decedent's death.

PATTERSON and HATCH, JJ., dissented.

APPEAL by Frances Hellman and another, as executors, etc., of Theodore Hellman, deceased, from an order of the Surrogate's Court of New York county, entered in said Surrogate's Court on the 8th day of October, 1902, affirming a previous order entered in said court on the 16th day of June, 1902, upon the report of an appraiser fixing the amount of the transfer tax upon the estate of said decedent.

*George W. Seligman*, for the appellants.

*Edward H. Fallows*, for the respondent.

INGRAHAM, J. :

The facts upon which the question in this case is to be determined are stated in the opinion of Mr. Justice HATCH, and it must be controlled by the provisions of the Tax Law (Laws of 1896, chap. 908). By subdivision 5 of section 2 of that act (as renumbered by Laws of 1901, chap. 490) it is provided that "the terms 'personal estate' and 'personal property' as used in this chapter include chattels, money, things in action, debts due from solvent debtors, whether on account, contract, note, bond or mortgage;

debts and obligations for the payment of money due or owing to persons residing within this State, however secured or wherever such securities shall be held; debts due by inhabitants of this State to persons not residing within the United States for the purchase of any real estate; public stocks, stocks in moneyed corporations and such portion of the capital of incorporated companies liable to taxation on their capital as shall not be invested in real estate." Section 220 of the act (as amd. by Laws of 1897, chap. 284) provides that "a tax shall be and is hereby imposed upon the transfer of any property, real or personal, of the value of five hundred dollars or over or of any interest therein or income therefrom." Section 221 (as amd. by Laws of 1901, chap. 458) provides that "when the property or any beneficial interest therein passes by any such transfer to or for the use of any father, mother, husband, wife, child, brother, (or) sister \* \* \* such transfer of property shall not be taxable under this act unless it is personal property of the value of ten thousand dollars or more, in which case it shall be taxable under this act at the rate of one per centum." These two provisions under which the tax has been imposed in this proceeding are a part of the chapter which contains the definition in subdivision 5 of section 2, to which attention has been called, and I think that property upon which a tax can be imposed under sections 220 and 221 of the act must be property as defined by subdivision 5 of section 2 of the act. In the case of *People ex rel. Lemmon v. Feitner* (167 N. Y. 1) the Court of Appeals, in construing subdivision 4 of section 2 of the Tax Law, held that the definition of "personal property" as contained in the Tax Law does not include a membership in the New York Stock Exchange. In that case, Judge VANN, writing for a majority of the court, said that a seat in the New York Stock Exchange is not personal property under the somewhat restricted definition of the Tax Law (Laws of 1896, chap. 908, § 2, subd. 4 [5]); that if owned by a resident it would not be taxable according to that definition, and when owned by a non-resident it is taxable only as personal property to the same extent as if owned by a resident. If a seat in the Stock Exchange or the money invested in such a seat is not taxable because not within the definition of personal property as contained in the Tax Law, which is applicable to the provision under which this tax is imposed, then it seems necessarily to

follow that a transfer of that seat, or the right to the seat, by the death of a holder is not a transfer of personal property which is taxable. Assuming that the money invested in this seat in the Stock Exchange was property of the testator before invested in the purchase of the seat, when invested in that species of property it was not subject to taxation. When the owner of the seat died there passed to his executors a right to the seat in the Stock Exchange. Whether or not that would be of any value depended upon the consent of the Stock Exchange to its transfer. It was not then money or a right to obtain money, but a right to a seat in the exchange which was subject to be transferred with the consent of the exchange. The fact that the exchange subsequently consented to a transfer of this right to a seat did not change the character of the right that was owned by the decedent and which passed upon his death to his personal representatives. All that the personal representatives acquired upon the death of the decedent was this right to a seat in the exchange which had belonged to the decedent and been used by him during his life, and that right the Court of Appeals have expressly held was not within the definition of personal property as used in the Tax Law. To say that what passed to the personal representatives of the decedent was "the capital invested in the seat" seems to be inconsistent with the nature of the right that passed to his personal representatives upon his death. What was transferred was the right that the decedent had to his seat subject to a transfer by complying with the rules of the exchange, and it was no more the capital invested in the purchase of that seat that passed by this transfer than was his real estate passing upon the death of a decedent a transfer of the capital invested in the real estate. What was owned by the decedent was the seat itself, and there vested in the personal representatives that right which by the constitution and by-laws of the exchange is recognized as existing in the personal representatives of a deceased member. If a member had purchased a seat just before his death and paid for it \$5,000, and its value at the time of his death was \$65,000, it would hardly be said that what passed to the personal representatives was the \$5,000 which he invested. In this proceeding there is no evidence as to what capital the deceased had invested in the purchase of this seat in the exchange, and the order

does not purport to tax that capital invested, but imposes a tax upon the value of the right that the personal representatives acquired by the transfer of the seat subject to the rules of the exchange. That a seat in the exchange is property, and that the Legislature would have power to impose a tax upon the transfer of such property, is conceded; but the Legislature, in defining personal property which is taxable under the Tax Law, has not included a right to a seat in the exchange as property that shall be taxable, and for that reason the court below had no authority to impose the tax.

*Matter of Glendinning* (68 App. Div. 125; affd. in 171 N. Y. 684) related to a tax imposed upon a transfer prior to the passage of the Tax Law, and under the act in force prior to that time (Laws of 1892, chap. 399), and is not in point.

The order should be reversed, with ten dollars costs and disbursements, and the proceeding dismissed, with costs.

VAN BRUNT, P. J., and LAUGHLIN, J., concurred; PATTERSON and HATCH, JJ., dissented.

HATCH, J. (dissenting):

Theodore Hellman died testate, a resident of the city of New York, on the 9th day of October, 1901. His will was duly admitted to probate and letters testamentary were duly issued to Frances Hellman and Isaac N. Seligman. An appraisal of the property of the decedent was duly had for the purpose of arriving at the amount of property subject to taxation under the Taxable Transfers Act. The decedent was a member of the New York Stock Exchange at the time of his death, and the appraiser in his report specified, among other personal property, that the decedent at the time of his death was the owner of a seat in the New York Stock Exchange, which was of the value of \$65,000 and was subject to taxation. This report was confirmed by an order of the surrogate of New York county, and from the order so made the executors appealed to the Surrogate's Court of New York county, and sought to set the same aside, upon the ground that a seat in the New York Stock Exchange was not subject to a transfer tax. The order appealed from was affirmed by the Surrogate's Court by an order made and entered on the 8th day of October, 1902; and from the order so made this appeal is taken.

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It was decided by the Court of Appeals in *People ex rel. Lemon v. Feitner* (167 N. Y. 1) that a seat in the New York Stock Exchange was not personal property under the restricted definition of the Tax Law (Laws of 1896, chap. 908, § 2, subd. 4, renumbered subd. 5 by Laws of 1901, chap. 490). If, therefore, the same rule is to be applied to the provisions of the Transfer Tax Law, it would necessarily follow that this species of property is not subject to a tax thereunder. It was held, however, in *Matter of Glendinning* (88 App. Div. 125) that such rule was not applicable to the provisions of the Transfer Tax Law, and that a succession to the amount represented thereby was subject to taxation thereunder. This decision was affirmed on appeal (171 N. Y. 684). The last decision is conclusive of the right to tax, unless the statute in respect thereto has been changed.

It is claimed, however, that the present Tax Law was not the subject of construction in the last-named case; that while the decision was rendered after the revision of the Tax Law in 1896, yet, in fact, the decedent died in 1893, and the question of liability of the property to the succession tax was determined under the Taxable Transfers Act of 1892 (Chap. 399); that the revision of 1896 worked a radical change in the provision of the Taxable Transfers Law, and that by its terms this property is exempted from the operation of such law. So far as material to the question presented by this appeal, the provisions of law covering the subject are as follows:

“§ 220. Taxable transfers.—A tax shall be and is hereby imposed upon the transfer of any property, real or personal, of the value of five hundred dollars or over, or of any interest therein or income therefrom, in trust or otherwise, to persons or corporations not exempt by law from taxation on real or personal property, in the following cases \* \* \*.

“§ 221. Exceptions and limitations.—When the property or any beneficial interest therein passes by any such transfer to or for the use of any father, mother, husband, wife, child, brother, (or) sister, \* \* \* such transfer of property shall not be taxable under this act, unless it is personal property of the value of ten thousand dollars or more, in which case it shall be taxable under this act at the rate of one per centum. \* \* \*



“§ 242. Definitions.—The words ‘estate’ and ‘property,’ as used in this article, shall be taken to mean the property or interest therein of the testator, intestate, grantor, bargainor, or vendor, passing or transferred to those not herein specifically exempted from the provisions of this article, and not as the property or interest therein passing or transferred to individual legatees, devisees, heirs, next of kin, grantees, donees, or vendees, and shall include all property or interest therein, whether situated within or without this State.” (Laws of 1896, chap. 908, as amd. by Laws of 1897, chap. 284, and Laws of 1901, chaps. 458, 173.)

By virtue of the provisions of section 220, the tax is imposed upon the transfer of any property, real or personal. Section 242 defines the words “estate” and “property” as used in the article. So defined it is taken to mean the property, or interest therein of the testator, passing or transferred to the successor thereof when not exempted by virtue of some provision of the article. (See § 243, added by Laws of 1900, chap. 382.) It has been decided that the tax imposed under this article is a tax upon the succession. (*Matter of Bronson*, 150 N. Y. 1; *Matter of Vanderbilt*, 172 id. 69.) If the transfer is of the seat in the Stock Exchange, then within the decision in *People ex rel. Lemmon v. Feitner* (*supra*), it is not subject to the tax, but if it is money, or proceeds of the sale of the seat, then it would seem to be property within the definition of the Transfer Tax Law. In the latter case a majority of the court held that the money which was invested in the seat constituted capital invested in a business. Clearly it was property of the testator before the time that he invested it in this form, and if it had descended in that form the successor in interest would have taken it subject to the payment of the tax. While invested, by reason of the restricted character of the Tax Law, and solely for the purpose of taxation, it was regarded as exempt therefrom for the reason that it was not embraced therein, but that it constituted property in a sense limited only by the conditions which attached to it has never been denied by any court. The persons succeeding to the interest in the present case do not succeed to the seat as such, nor do they take any rights thereunder. What passed in reality is the capital invested in the seat; when it is sold the capital is withdrawn. Ultimately the persons who take under the will

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of the decedent receive the capital invested by the testator in the purchase of the seat in the Stock Exchange. The testator had no power by will, or otherwise, to convey to any person, without the consent of the Stock Exchange, a right to a seat therein; consequently, the persons taking under the will do not take the seat, but they take the money invested therein. This is property that would be property in the hands of the testator, and the successors take nothing else. In the report of the appraiser this property is stated to be a seat in the Stock Exchange, \$65,000. In the affidavit of the executor Seligman it appears that on or about the 15th day of November, 1901, the executors sold the said seat for the sum of \$65,000, which was its value on the day of the sale. It is clear, therefore, that what the legatees take under this will is money which had been invested, and this is property within the meaning of the Transfer Tax Law, and as such is subject to the payment of the tax.

If these views are correct, it follows that the decree of the surrogate should be affirmed, with ten dollars costs and disbursements.

PATTERSON, J., concurred.

Order reversed, with ten dollars costs and disbursements, and proceedings dismissed, with costs.

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ALEXANDER HARVEY, Appellant, v. SAMUEL McCONCHIE,  
Respondent.

*Negligence — injury from the fall of a defective scaffold — when the employee assumes the risk.*

In an action brought by a journeyman painter against his employer, a boss painter, to recover damages for personal injuries sustained by the journeyman in consequence of the collapse of a scaffold upon which the journeyman was standing while painting a house, it appeared that both the plaintiff and the defendant assisted in the construction of the scaffold. The plaintiff testified that he refused to use the scaffold until after he had been assured of its safety by the defendant. The defendant denied having given such assurance. The issue thus raised, and also the question whether the defects, if any, in the scaffold were obvious, were submitted to the jury. The court charged as follows: "the plaintiff and the defendant together erected the appliance; each

knew there were no nails in it; each knew there were no ropes tied there, and it is for you to say whether or not, under those circumstances, it was not one of the obvious risks of the employment, which was part of the contract of hiring which the plaintiff assumed, because if the plaintiff did not assume the obvious risks of hiring, then an employer would be an insurer. \* \* \* The plaintiff must look out for himself; he must not go into a business with obvious risks if he does not want to assume them. \* \* \* It is for you to consider whether whatever risks there were, he did not see them."

*Held*, that the charge was proper and that a judgment entered upon a verdict in favor of the defendant should be affirmed.

HATCH, J., dissented.

APPEAL by the plaintiff, Alexander Harvey, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of New York on the 22d day of April, 1902, upon the verdict of a jury, and also from an order entered in said clerk's office on the 21st day of April, 1902, denying the plaintiff's motion for a new trial made upon the minutes.

*Theodore B. Chancellor*, for the appellant.

*Joseph Fettesch*, for the respondent.

INGRAHAM, J.:

This judgment should be affirmed. The facts are stated in the opinion of Mr. Justice HATCH. The court charged the jury that "the plaintiff and the defendant together erected the appliance; each knew there were no nails in it; each knew there were no ropes tied there, and it is for you to say whether or not, under those circumstances, it was not one of the obvious risks of the employment, which was part of the contract of hiring which the plaintiff assumed, because if the plaintiff did not assume the obvious risks of hiring, then an employer would be an insurer. \* \* \* The plaintiff must look out for himself; he must not go into a business with obvious risks if he does not want to assume them \* \* \*. It is for you to consider whether whatever risks there were, he did not see them."

I think this was correct. Assuming that there was a violation by the defendant of the duty to furnish to his employee a safe scaffold upon which to do his work, a failure to furnish such a scaffold would justify the jury in finding the defendant negligent. The

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ordinary rule, however, that, as between employer and employee, an employee assumes an obvious risk in doing the work which he is employed to do, applies. The plaintiff testified that he helped to erect this scaffold; that he knew as much about it as the defendant; that he expressed doubt about its safety and only used it when assured by the defendant that it was safe. The defendant denied that he gave such assurance, and the question whether such assurance was given was submitted to the jury, who have found a verdict for the defendant. While this was a question for the jury, I think it was left to them by a charge that was free from error, and that their verdict should not be disturbed. The plaintiff had assisted in the construction of this scaffold; was familiar with the details of its construction, and if he used it with full knowledge of its condition without any assurance from the defendant that it was safe or a proper one under the circumstances, the jury were justified in finding that the plaintiff had assumed the risk in the use of the appliance as it existed when he used it. I do not find that the court charged that whatever defects existed in this appliance were perfectly obvious, but that question was, I think, fairly left to the jury.

The judgment and order should be affirmed, with costs.

VAN BRUNT, P. J., O'BRIEN and McLAUGHLIN, JJ., concurred;  
HATCH, J., dissented.

HATCH, J. (dissenting):

This action was brought to recover damages for personal injuries claimed to have been sustained by the plaintiff through the negligent act of the defendant. It appeared upon the trial that the plaintiff was a journeyman painter in the employ of the defendant, who was a boss painter. On the day of the accident the parties were engaged in painting a house, of which the defendant was part owner, in the city of Yonkers. The defendant was personally present during the performance of the work and supervised the same. He directed the plaintiff to paint a portion of the side of the house above the veranda constructed upon one side. For the purpose of enabling the plaintiff to perform this work two boards were laid upon the sloping roof of the veranda, separated at a distance of ten or twelve feet. At the end of these boards on the

under side was nailed a cleat, which fitted into the gutter, preventing their sliding from the roof or giving away. Upon the top of these boards were nailed several cleats at intervals of about a foot apart. Across the boards was placed a plank which rested against one of the cleats nailed to the boards on either end. Against this plank was rested a ladder upon which the defendant was to stand in painting the house. Neither the boards upon which were fastened the cleats nor the cross plank were nailed or otherwise fastened, nor were they otherwise held in place, except by the cleats which rested in the gutter. After this structure was placed in position the plaintiff demurred to going upon the ladder, and thereupon the defendant procured and placed between the horizontal plank and the ladder a piece of fence rail. This brought the foot of the ladder to rest against this piece of rail. The plaintiff again expressed doubt as to the safety of the structure, took hold of the ladder and made a slight test of it. The defendant then said to the plaintiff: "You ain't afraid, are you? I says no, but I don't want to come down. He says that is all right; it has been done that way before." Plaintiff then testified: "With this assurance I went up and had not been working but a few seconds on it when it gave way; the whole thing gave way and precipitated me off the roof."

The court held that the evidence in the case presented a question for determination by the jury, and we think that such conclusion was correct. We are, however, of the opinion that the court committed an error in the submission of the case, which calls for a reversal of this judgment. In charging the jury, the court stated that under the rules which exist between master and servant in the course of employment the latter assumes obvious risks and may not be heard in complaint, if therefrom the servant receives injuries in the course of his employment, and applying the rule to the facts of the particular case the court stated: "So if a painter goes upon a ladder to paint, there is an obvious risk about it that he assumes; for instance, in a structure of this kind, if there is no latent defect in it. There is no testimony here that anything broke or that there was any defect in any of the material which could not have been discovered, and whatever defects there were were perfectly obvious. The plaintiff and the defendant together erected the appliance; each knew there were no nails in it; each knew there were no ropes

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tied there, and it is for you to say whether or not under those circumstances it was not one of the obvious risks of the employment, which was part of the contract of hiring which the plaintiff assumed, because if the plaintiff did not assume the obvious risks of hiring, then an employer would be an insurer; that is to say, he would be responsible in every event for an accident to an employe. That is not the law. Perhaps you think it ought to be the law, but it is not the law. The plaintiff must look out for himself; he must not go into a business with obvious risks if he does not want to assume them." To this part of the charge the plaintiff excepted.

By the provisions of section 18 of the Labor Law (Laws of 1897, chap. 415) it is made the absolute duty of the master not to furnish an unsafe or unsuitable structure of this character. Under this section it has been held that the structure is to be regarded as a place furnished by the master for the servant to do his work; that a duty is devolved upon the master not to permit this place to be unsafe, unsuitable or improper, and that in the erection of the structure by the servant he acts as the master himself. (*Stewart v. Ferguson*, 34 App. Div. 515.) This rule was reiterated in *Stewart v. Ferguson* (52 App. Div. 317), and the doctrine to the fullest extent was laid down by the Court of Appeals in the affirmance of the judgment in that case. (*Stewart v. Ferguson*, 164 N. Y. 553.) It is therein said: "Its fall, in the absence of evidence of other producing cause, points to the omission of the duty enjoined by the statute upon the defendant to the plaintiff in its construction, and points to it with that reasonable certainty which usually tends to produce conviction in the mind in tracing events back to their causes, and thus creates a presumption. It is circumstantial evidence, and if it does convince the jury, it justifies their verdict." It is clear, therefore, that the fall of this structure raised the presumption that the master had been guilty of negligence in failing to perform the duty which the statute imposed upon him, and in the absence of exculpatory testimony, such presumption would justify a verdict in favor of the plaintiff. The defendant is not liable, however, if the defect was known to the plaintiff when he made use of the structure. If he knew that it was unsafe, unsuitable or improper, and made use of it with such knowledge, then he assumes the risk incident to the use, even though

the defendant violated the statutory duty. (*McLaughlin v. Eidlitz*, 50 App. Div. 518.)

The burden, however, of showing that the servant knew and, therefore, assumed the risk, rests upon the master, and furnishes a question of fact for the jury. (*Dowd v. N. Y., O. & W. R. Co.*, 170 N. Y. 459.)

The court charged that whatever defects existed were perfectly obvious, and if he was correct upon this subject then it would seem to follow that the plaintiff was chargeable with knowledge of them, and if this be so then there was nothing to submit to the jury. The law, however, assumes that the master has complete knowledge upon the subject, and when he gives assurance of safety, the servant has a right to rely thereon, unless it clearly appears that the servant's knowledge was in all material respects equal to the knowledge of the master. (*Chadwick v. Brewster*, 15 N. Y. Supp. 598.)

We do not think it can be said as matter of law under the rule established by the statute that the defects of this structure were perfectly obvious. On the contrary, it does not appear in the record what the particular defect was which caused this structure to fall. All the proof there is on that subject is that the structure fell a short time after the plaintiff went upon it and while he was engaged in reaching out to one side applying the paint to the building. Whether it was due to the insecurity of the cleats, or either of them, resting in the gutter, or from the instability of the horizontal plank, or from the sliding of the ladder under the piece of fence rail, is not known so far as the record of this case is concerned. In the absence of proof as to what occasioned the structure to fall, and of knowledge upon that subject by any person, it is quite difficult to see how it can be said that the risk assumed by the plaintiff in going upon the ladder was perfectly obvious when it is impossible to ascertain after the accident happened what the particular weakness of the structure was. The statute imposed the absolute duty upon the master to furnish a structure that was safe. After it was so furnished he assured the plaintiff that it was safe and had been used in like manner before; and, acting upon such assurance, the plaintiff entered upon it in the course of his employment. It fell and what caused it to fall does not appear. Manifestly, therefore, the charge to the

jury that the defect which caused it to fall was perfectly obvious was error.

The judgment and order should, therefore, be reversed and a new trial granted, with costs to appellant to abide the event.

Judgment and order affirmed, with costs.

THE CITY OF NEW YORK, Respondent, v. SIXTH AVENUE RAILROAD	77	367
COMPANY, HOUSTON, WEST STREET AND PAVONIA FERRY RAIL-	f 77	374
ROAD COMPANY and METROPOLITAN STREET RAILWAY COMPANY,	f 77	641
Appellants.	f 77	642

*Street railway company in New York city — what company, as lessee, is bound to pay to the city a license fee for each car run — the lessor, not running cars, is not.*

The complaint in an action brought by the city of New York against the Sixth Avenue Railroad Company, the Houston, West Street and Pavonia Ferry Railroad Company and the Metropolitan Street Railway Company, alleged that, prior to the incorporation of the Sixth Avenue Railroad Company, a contract was entered into between the city of New York and the incorporators or assignors of that railroad company which provided that "each of said passenger cars to be used on said roads shall be annually licensed by the Mayor; and there shall be paid annually for such licenses such sum as the Common Council shall hereafter determine;" that this contract was confirmed by the charter of the railroad company, and that on December 31, 1858, the common council of the city of New York adopted an ordinance providing, "Each and every passenger railroad car running in the City of New York below 125th street, shall pay into the city treasury the sum of fifty dollars, annually, for a license."

The complaint further alleged that on February 1, 1892, the Sixth Avenue Railroad Company leased its lines to the Houston, West Street and Pavonia Ferry Railroad Company, and that on December 12, 1893, the Houston, West Street and Pavonia Ferry Railroad Company was consolidated with the Metropolitan Street Railway Company, and that the latter railroad company had ever since operated the lines of the Sixth Avenue Railroad Company.

This action was brought to recover license fees for the cars operated upon the lines of the Sixth Avenue Railroad Company from 1895 to 1899 inclusive.

*Held*, that the obligation of the Sixth Avenue Railroad Company to pay a license fee for each car used upon its road terminated when it leased its road and franchise to the Houston, West Street and Pavonia Ferry Railroad Company;



That when the Houston, West Street and Pavonia Ferry Railroad Company became merged in the Metropolitan Street Railway Company, the latter company assumed the former company's liability for the payment of the license fees in question;

That the only cause of action alleged in the complaint was a cause of action against the Metropolitan Street Railway Company for the license fees for the cars actually used by that company in the operation of the lines of the Sixth Avenue Railroad Company;

That, consequently, the complaint was not demurrable on the ground that causes of action were improperly united therein, but that it was demurrable as to the Sixth Avenue Railroad Company and the Houston, West Street and Pavonia Ferry Railroad Company on the ground that it did not state a cause of action against those railroad companies;

That the complaint, however, stated a cause of action as to the Metropolitan Street Railway Company and was not demurrable as to that company.

APPEAL by the defendants, the Sixth Avenue Railroad Company and others, from an interlocutory judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 14th day of May, 1902, upon the decision of the court, rendered after a trial at the New York Special Term, overruling the defendants' joint and separate demurrers to the complaint.

*Charles F. Brown*, for the appellants.

*Chase Mellen*, for the respondent.

INGRAHAM, J. :

This action is brought to recover license fees for the cars used in the operation of the railroad owned by the Sixth Avenue Railroad Company. The complaint, after alleging the incorporation of the plaintiff, alleges that the defendant, the Sixth Avenue Railroad Company, is a street surface railroad organized and existing pursuant to the provisions of the General Railroad Act (Laws of 1850, chap. 140 as amd.) and pursuant to the terms and conditions of a certain instrument in writing, dated September 6, 1851, executed by and between the mayor, aldermen and commonalty of the city of New York and certain persons, incorporators or assignors of said railroad corporation therein mentioned; that the defendant Houston, West Street and Pavonia Ferry Railroad Company is a street surface railroad corporation organized and existing under the General Railroad Act (Laws of 1850, chap. 140 as amd.); that the defendant the Metro-

politan Street Railway Company is a street surface railroad corporation organized and existing under the provisions of the General Railroad Law (Laws of 1890, chap. 565 as amd.), having been incorporated on the 29th day of November, 1893, and May 18, 1894; that on or about February 1, 1892, the defendant the Sixth Avenue Railroad Company leased its lines of railroads and appurtenances in the city of New York to the defendant Houston, West Street and Pavonia Ferry Railroad Company, and that subsequently and on December 12, 1893, the said Houston, West Street and Pavonia Ferry Railroad Company was duly consolidated and merged into and with the defendant the Metropolitan Street Railway Company; that at all times thereafter the defendant Metropolitan Street Railway Company has been in full possession and control of and has operated the lines of railroad cars and other property of the defendant Sixth Avenue Railroad Company; that in and by an instrument in writing, dated September 6, 1851, between the mayor, aldermen and commonalty of the city of New York and the persons, incorporators or assignors of said Sixth Avenue Railroad Company, it was provided, "That each of said passenger cars to be used on said roads (meaning the cars used or to be used on the lines of railroad of said Sixth Avenue Railroad Company in the City of New York) shall be annually licensed by the Mayor; and there shall be paid annually for such licenses such sum as the Common Council shall hereafter determine;" that on December 31, 1858, the common council of the city of New York duly adopted an ordinance which provided: "Each and every passenger railroad car running in the City of New York below 125th street, shall pay into the city treasury the sum of fifty dollars, annually, for a license;" that during the years 1895 to 1899, inclusive, the defendant Metropolitan Street Railway Company used upon the lines of the said Sixth Avenue Railroad Company, below One Hundred and Twenty-fifth street, in the city of New York, passenger cars for which there became due, and it became liable to pay annually during each of said years, various sums of money, of which, after deducting the amount paid by the said corporation, there was due to the plaintiff the sum of \$7,700.

The defendants demurred jointly to the complaint upon the ground that it appears from the face thereof that causes of action

have been improperly united ; and each defendant also demurred separately upon the ground stated in the joint demurrer, and also upon the ground that the complaint does not state facts sufficient to constitute a cause of action against it. This demurrer was overruled, and from the interlocutory judgment entered thereon the defendants appeal.

It is apparent that the complaint alleges no cause of action against the Houston, West Street and Pavonia Ferry Railroad Company. Its only relation to the property was through a lease of its railway and property made by the Sixth Avenue Railroad Company to the Houston, West Street and Pavonia Ferry Railroad Company, and that subsequently the Houston, West Street and Pavonia Ferry Railroad Company became merged with the defendant, and thus lost its corporate identity. While the corporate existence was retained so far as it affected existing creditors at the time of the merger, as to all future transactions it became extinct by the merger, and all obligations of the Houston, West Street and Pavonia Railroad Company were assumed by and imposed upon the corporation that took its place, and the Houston, West Street and Pavonia Ferry Railroad Company could, after its merger, create no new obligations or be liable for acts of the corporation into which it had been merged ; and the fact that there were obligations incurred after the merger could not create an obligation of the company that had lost its corporate identity in consequence of the merger.

In his brief upon this appeal the learned counsel for the defendants states that the second ground of demurrer is not urged on behalf of the defendants the Sixth Avenue Railroad Company and the Metropolitan Street Railway Company. He does insist, however, that causes of action are improperly united, and to sustain the demurrer on this ground it must appear from the complaint that there are several causes of action alleged, and that they are improperly united in the complaint. If there is but one cause of action alleged against one of the defendants, and no cause of action is alleged against the remaining defendants, causes of action have not been improperly united. The cause of action that is alleged is based upon the obligation assumed by the acceptance by the Sixth Avenue Railroad Company of the franchise upon the conditions imposed upon it by its charter. By section 3 of chapter 140 of

the Laws of 1854 it was provided that "the respective parties and companies by whom such roads have been in part constructed, and their assigns, are hereby authorized to construct, complete, extend and use such roads in and through the streets and avenues designated in the respective grants, licenses, resolutions or contracts under which the same have been so in part constructed, and to that end the grants, licenses and resolutions aforesaid are hereby confirmed." Prior to the passage of this act a grant or contract had been executed between the mayor, aldermen and commonalty of the city of New York and the persons, incorporators and assignors of the Sixth Avenue Railroad Company, in which it was provided that "each of said passenger cars to be used on said roads shall be annually licensed by the Mayor; and there shall be paid annually for such licenses such sum as the Common Council shall hereafter determine."

By this agreement it is "each of said passenger cars to be used on said roads" that is to be licensed, and for such license there was to be paid annually such sum as the common council should thereafter determine. It was, therefore, the cars to be used in operating the roads for which a license was to be obtained. There was imposed upon the incorporators no obligation except for each car that was used in the operation of the railroad, and the only liability that the railroad incurred was a license fee for the cars so used. If the railroad company used no cars, it was under no obligation to obtain a license and was not liable for the fees required therefor.

On December 31, 1858, the common council of the city of New York passed an ordinance which provided that "each and every passenger railroad car running in the City of New York \* \* \* shall pay into the city treasury the sum of fifty dollars, annually, for a license." The effect of this ordinance was to fix the amount of the license fee that the Sixth Avenue Railroad Company was required to pay as a condition of the grant of the franchise which it acquired by operation of the grant from the city, which was confirmed by the Legislature, and imposed no greater obligation upon the railroad company than was contained in the grant from the city. When, therefore, the railroad company ceased to operate its road, leasing its road and franchise to the Houston, West Street and Pavonia Ferry Railroad Company, it ceased to operate its road and

ceased to use cars for that purpose. The obligation upon this particular corporation to obtain a license for the cars used by its lessee, or to pay a license fee therefor, was no longer applicable to the Sixth Avenue Railroad Company, who used no cars in the operation of their road. That there was imposed upon the lessee company an obligation to obtain a license for the cars which it used in the operation of the road, and to pay a license fee therefor, is settled by the case of *Mayor v. Twenty-third Street R. Co.* (113 N. Y. 311). Judge EARL, in delivering the opinion of the court, there says: "The entity called a corporation consists of the sum total of all its charter powers and rights and all its charter obligations and duties, and such powers and rights cannot be effectually divorced from such obligations and duties. The latter are correlatives to the former and constitute the consideration for the corporate franchises, and their performance may be exacted as a condition of corporate existence. Hence, when the defendant took the property, rights, privileges and franchises of the Bleecker Street and Fulton Ferry Railroad Company, it took them burdened with its charter obligations. Taking the place of that company as to its charter powers and rights, it necessarily took its place as to its charter obligations and duties. It could not have and exercise the former without discharging the latter."

The lessee company having thus assumed the obligations imposed upon the lessor by its charter, was bound to perform such obligations; but as this obligation was imposed upon the Sixth Avenue Railroad Company only for the cars used in operating the road, when it used no cars in said operation it was under no liability to pay the license fee therefor.

I think, therefore, that the only cause of action alleged in this complaint was a cause of action against the Metropolitan Street Railway Company for the license fees for the cars actually used by that company in the operation of the road; and for that reason this joint and the separate demurrer that causes of action were improperly united were properly overruled.

It follows that the judgment appealed from, so far as it overrules the separate demurrers of the Sixth Avenue Railroad Company and the Houston, West Street and Pavonia Ferry Railroad Company, should be reversed and the demurrers sustained, with costs in this

court and in the court below; and that the judgment, so far as it overrules the separate demurrer of the Metropolitan Street Railway Company, should be affirmed, with costs, with leave to the Metropolitan Street Railway Company to answer on payment of costs in this court and in the court below.

VAN BRUNT, P. J., PATTERSON, HATCH and LAUGHLIN, JJ., concurred.

Judgment, so far as it overrules the separate demurrers of the Sixth Avenue Railroad Company and the Houston, West Street and Pavonia Ferry Railroad Company, reversed and the demurrers sustained, with costs in this court and in the court below; and, so far as it overrules the separate demurrer of the Metropolitan Street Railway Company, affirmed, with costs, with leave to the Metropolitan Street Railway Company to answer on payment of costs in this court and in the court below.

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THE CITY OF NEW YORK, Respondent, v. TWENTY-THIRD STREET RAILWAY COMPANY, HOUSTON, WEST STREET AND PAVONIA FERRY RAILROAD COMPANY and METROPOLITAN STREET RAILWAY COMPANY, Appellants.

*Street railway company in New York city — what company is not bound to pay to the city a license fee for each car run by it — its successor is not.*

The ordinance of the city of New York, passed December 31, 1858, providing that every passenger railroad car running in the city of New York below One Hundred and Twenty-fifth street shall pay into the city treasury an annual license fee of fifty dollars was not binding upon the Twenty-third Street Railway Company, which was incorporated in 1872, and which was not required, either by the terms of its charter or by any agreement with the city, to pay the license fee.

The ordinance not having been binding upon the Twenty-third Street Railway Company, the Metropolitan Street Railway Company, which acquired the property and franchises of the Twenty-third Street Railway Company, cannot be required to pay a license fee upon the cars operated on the lines formerly operated by the Twenty-third Street Railway Company.

VAN BRUNT, P. J., dissented.

APPEAL by the defendants, the Twenty-third Street Railway Company and others, from an interlocutory judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 14th day of May, 1902, upon the decision of the court, rendered after a trial at the New York Special Term, overruling the defendants' joint and separate demurrers to the complaint.

*Charles F. Brown*, for the appellants.

*Chase Mellen*, for the respondent.

INGRAHAM, J. :

Upon the demurrer of the Houston, West Street and Pavonia Ferry Railroad Company, there is presented the same question as is presented in the case of *City of New York v. Sixth Avenue R. R. Co.* (77 App. Div. 367), and for the reasons there stated the judgment, so far as it overrules the demurrer of the Houston, West Street and Pavonia Ferry Railroad Company, must be reversed and the separate demurrer of that corporation sustained.

The appellants in this case also attack the sufficiency of the complaint, alleging that it does not state facts sufficient to constitute a cause of action against either of them. The complaint alleges that under the authority conferred by chapter 823 of the Laws of 1869 the commissioners of the sinking fund of the mayor, aldermen and commonalty of the city of New York sold at public auction to one Yeomans the right, privilege and franchise to construct and operate a railroad through and along Twenty-third street from the North river to the East river for \$150,000; that by chapter 521 of the Laws of 1872 the comptroller of the said municipal corporation was authorized and directed, on payment into the city treasury by Yeomans of the sum of \$150,000, to issue to him or to his assignees the certificate specified in said act of 1869, to the effect that he, they and their successors and assigns are entitled to the grant of the rights, privileges and franchises mentioned, described and conferred in and by said act of 1869; that on or about the 29th day of January, 1872, the defendant, the Twenty-third Street Railway Company, filed its articles of association and became a street surface railroad corporation under and pursuant to the laws of the State of New

York, and subsequently acquired the rights, privileges and franchises conferred upon said Yeomans under and pursuant to the terms of chapter 521 of the Laws of 1872; and that by chapter 100 of the Laws of 1873 said Twenty-third Street Railway Company was authorized to extend its tracks and use and operate the same in connection with its then existing railroad through certain streets and avenues in the city of New York; that at the time the act of 1873 took effect there was an ordinance of the common council of the mayor, aldermen and commonalty of the city of New York in force which provided that each and every passenger railroad car running in the city of New York below One Hundred and Twenty-fifth street shall pay into the city treasury the sum of fifty dollars annually for a license, which ordinance was duly passed and approved by the mayor on December 31, 1858.

At the time the ordinance of 1858 was passed, various street railroad companies in the city of New York had been incorporated, with a condition imposing upon them an obligation to pay a license fee for the cars used by them in the operation of their railroads; and as to railroads incorporated under such conditions it has been held that this ordinance of the common council was operative, and that under the conditions of their charters they were liable for the license fee thereby provided for. But the charter of the Twenty-third Street Railway Company was granted upon no such condition. Its right to use the franchise was acquired by a sale at public auction by which the city of New York was entitled to receive a certain percentage of the receipts of the company as a condition for the use of the public streets in the city of New York; but so far as appears there was no other condition imposed upon the company for a right to use the franchise granted to it by the Legislature. The question presented, therefore, is whether this ordinance affects a railroad company expressly authorized by the Legislature to operate its road in the public streets of the city of New York without requiring the company to pay a license fee for the cars used in the operation of its road.

In the case of *Mayor v. Second Ave. R. R. Co.* (32 N. Y. 261) the question before the court depended upon the power of the municipal corporation to require the Second Avenue Railroad Company to pay the license fees provided for by this ordinance. That



action was brought to recover the fifty dollars per car imposed by the ordinance of 1858. The defendant admitted the facts alleged in the complaint, and set up as a defense an agreement made between the municipal corporation and the defendant's assignors, dated December 15, 1852, whereby permission was granted to such assignors to construct and operate a railroad in Second avenue. To this answer there was a demurrer which was overruled. It was held that this ordinance was not binding upon a railroad corporation, unless its charter or an agreement with the municipal corporation expressly provided that the railroad corporation should pay license fees. The court, in affirming a judgment overruling the demurrer, says: "The plaintiffs must show, however, that the subject of the ordinance which they are seeking to enforce is one over which they have authority to legislate, and that it is a regulation of police and internal government, and not the mere imposition of a duty or sum of money for the purposes of revenue. \* \* \* The only act enjoined by the ordinance in question is the payment of the fifty dollars, and the only act which it forbids and prohibits is the running of the cars without the payment of the money. \* \* \* So with this ordinance, call what it requires by the name of license or certificate of payment or anything else, its primary and, indeed, only purpose is to take from the company, under coercion of the penalty which it imposes, the sum of fifty dollars annually for each car run upon the road for the benefit of the city. The certificate which the company is to receive upon payment being made is called a license in the ordinance. A license to do what the ordinance does not say — and indeed it could not, with truth, say — a license or permission to employ the car in the transportation of passengers upon the road, for the absolute right to do that which had been not only acquired but positively enjoined upon the company by the stipulations of the grant of the 15th of December, 1852. It is in vain, therefore, to speak of it or to treat it as a license or a regulation of police. It is the imposition of an annual tax upon the company in derogation of its rights of property, and on that account is unlawful and void."

This case was followed by *Mayor v. Third Ave. R. R. Co.* (83 N. Y. 42). That was an action to recover from the Third Avenue Railroad Company the fifty dollars license fee required to be paid

by the ordinance of 1858, instead of the twenty dollars license fee required to be paid by the agreement with the city under which the Third Avenue Railroad Company constructed its railroad; and it was held that the decision in the case of *Mayor v. Second Ave. R. R. Co.* (*supra*) disposed of the question presented; that "the increase of the sum payable as a license fee under the ordinance of 1858, beyond the amount provided for by the stipulations in the contract of 1853, so far as it was in derogation of the defendant's rights, must be deemed illegal and void. It was not the exercise of the power of municipal regulation reserved by the terms of the grant, and which the common council had no authority to alienate, but it was simply an attempt by one of the parties to a contract to revoke a provision inserted for the benefit of the other. The common council could not lawfully impose a penalty for non-compliance with an illegal exaction."

A question arising under this ordinance was again before the Court of Appeals in *Mayor v. B'way, etc., R. R. Co.* (97 N. Y. 275). In that case the charter of the defendant railroad provided that the railroad authorized by the charter should be subject to "the payment to the city of the same license fee annually for each car run thereon as is now paid by other city railroads in said city." It was held that under this provision the defendant was bound to pay the license fee provided for by the ordinance of 1858; that there was a contract of the defendant which arose from the provisions of the charter, by which it agreed to pay a certain sum reserved therein in consideration of the privileges conferred thereby; and in speaking of the cases of *Mayor v. Second Ave. R. R. Co.* and *Mayor v. Third Ave. R. R. Co.* (*supra*) it was said that as to those companies the ordinance was an imposition of an annual tax upon the company and in derogation of its rights and property, and on that account was unlawful and void; that "in both these cases the question arising as to the validity of the ordinance was considered, having in view only such roads as were constructed either without any reservation whatever in the charter, or a different one from that provided for by the ordinance;" that the ordinance was valid as to the city railroads which were required by their charters or by contract with the city to pay a given sum to the city in consideration of the privileges conferred.

It would seem, therefore, to have been settled by these cases that, so far as this ordinance imposes a license fee upon corporations which have received a legal authority to construct and operate street railroads in the city of New York, where there is no obligation imposed by their charters or by contract to pay to the city of New York a license fee for cars used in the operation of their roads, this ordinance is not binding, it being in excess of the power of the common council to impose such an obligation. It would seem to follow, therefore, that the Twenty-third Street Railway Company, having been authorized by the Legislature to construct and operate its road without any reservation or condition which imposed upon that corporation an obligation to pay a license fee to the city of New York, was not subject to the ordinance of 1858, and there was no obligation to pay to the city of New York a license fee as therein provided. As there was imposed no liability upon the Metropolitan Street Railway Company to pay a license fee to the city of New York, except that it assumed to pay the obligation of the Twenty-third Street Railway Company when it acquired the property and franchise of that company, and as there was no obligation upon the Twenty-third Street Railway Company to pay this license fee provided for by the ordinance of 1858, neither of these corporations is liable for the license fee therein provided.

The result, therefore, is that the judgment appealed from must be reversed, with costs, and the demurrer of all the defendants sustained, with costs, upon the ground that the complaint does not state facts sufficient to constitute a cause of action against either of them, with leave to the plaintiff to amend the complaint upon payment of costs in this court and in the court below.

PATTERSON, HATCH and LAUGHLIN, JJ., concurred; VAN BRUNT, P. J., dissented.

Judgment reversed, with costs, and the demurrer of all the defendants sustained, with costs, with leave to the plaintiff to amend complaint on payment of costs in this court and in the court below.

THE CITY OF NEW YORK, Respondent, v. THE THIRD AVENUE RAILROAD COMPANY and METROPOLITAN STREET RAILWAY COMPANY, Appellants.

*Street railway company in New York city — a lessee is not bound to pay to the city a license fee for each car run prior to its acceptance of the lease — effect of its taking the demised property "subject to all debts and liabilities of" the lessor.*

The complaint in an action brought by the city of New York against the Third Avenue Railroad Company and the Metropolitan Street Railway Company alleged that the grant made by the mayor, aldermen and commonalty of the city of New York to the incorporators of the Third Avenue Railroad Company, pursuant to which the railroad company was organized, provided that the incorporators of the railroad company "shall pay, from the date of opening the said railroad, the annual license fee for each car now allowed by law and shall have licenses accordingly," and that this grant was confirmed by the statute under which the railroad company was organized (Laws of 1854, chap. 140, § 8); that prior to the year 1894 the Third Avenue Railroad Company duly paid the annual license fees for its cars, but had neglected to do so since that time; that on April 8, 1900, the Third Avenue Railroad Company leased its roads to the Metropolitan Street Railway Company "subject to all debts and liabilities of the parties of the first part" (the lessor); that the lease contained an agreement on the part of the lessee to "pay, satisfy and discharge all municipal, county, state or government taxes and assessments, license fees or other charges of any description whatever which during the term hereby granted may be imposed upon the property hereby demised, or any part thereof, or upon any additions or extensions thereof."

The action was brought to recover license fees for the cars operated by the Third Avenue Railroad Company upon its lines during the years 1894 to 1899, inclusive.

*Held*, that the complaint did not state a cause of action against the Metropolitan Street Railway Company;

That, as the Metropolitan Street Railway Company simply accepted a demise of the property of the Third Avenue Railroad Company, "subject to all debts and liabilities" of the Third Avenue Railroad Company, and did not agree to pay the existing debts and liabilities of that company, and as the Third Avenue Railroad Company was still an existing corporation, liable for its debts and obligations, the Metropolitan Street Railway Company was not liable for the license fees accruing prior to the execution of the lease;

That the provision in the lease requiring the lessee to "pay, satisfy and discharge all municipal, county, state or government taxes and assessments, license fees or other charges of any description whatever which during the term hereby granted may be imposed upon the property hereby demised, or any part thereof," rendered the lessee company liable for all license fees accruing after the execution and delivery of the lease, but did not relate to license fees which had accrued prior to the execution thereof.

APPEAL by the defendants, The Third Avenue Railroad Company and another, from an interlocutory judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 14th day of May, 1902, upon the decision of the court, rendered after a trial at the New York Special Term, overruling the defendants' joint and separate demurrers to the complaint.

*Charles F. Brown*, for the appellants.

*Chase Mellen*, for the respondent.

INGRAHAM, J. :

The plaintiff, The City of New York, brings this action to recover certain annual license fees for the cars used by the defendant the Third Avenue Railroad Company, in the operation of its railroad. The complaint alleges that the plaintiff, a municipal corporation, existed under ancient charters and acts of the Legislature and has succeeded to all the rights, obligations and liabilities of the old mayor, aldermen and commonalty of the city of New York by virtue of the present city charter (Laws of 1897, chap. 378); that the defendant the Third Avenue Railroad Company is a street surface railroad company organized and existing pursuant to the provisions of the General Railroad Act (being chapter 140 of the Laws of 1850 as amd.) and was organized on October 8, 1853, to construct and operate a railroad in the city of New York in pursuance of the terms of a grant or agreement between the mayor, aldermen and commonalty of the city of New York (plaintiff's predecessor) and the persons incorporating the said railroad company, dated January 1, 1853; that the defendant the Metropolitan Street Railway Company is a domestic street surface railroad corporation organized and existing under the laws of the State of New York duly incorporated on November 29, 1893, and May 18, 1894; that the said agreement or grant under which the Third Avenue Railroad Company is operating its road contained the following: "Resolved that in consideration of the good and faithful performance of the conditions, stipulations and agreement above prescribed and of such other necessary requirements as may hereafter be made by the common council for the regulations of the said railroad, the said

parties (meaning the incorporators of said defendant The Third Avenue Railroad Company) shall pay, from the date of opening the said railroad, the annual license fee for each car now allowed by law and shall have licenses accordingly;" that section 3 of chapter 140 of the Laws of 1854, entitled "An Act relative to the construction of railroads in cities," provides, "This act shall not be held to prevent the construction, extension or use of any railroad, in any of the cities of this State, which have already been constructed in part; but the respective parties and companies by whom such roads have been in part constructed, and their assigns, are hereby authorized to construct, complete, extend and use such roads in and through the streets and avenues designated in the respective grants, licenses, resolutions or contracts under which the same have been so in part constructed, and to that end the grants, licenses and resolutions aforesaid are hereby confirmed;" that at the time when such agreement or grant was executed, to wit, January 1, 1853, the annual license fee for each car allowed by law was the sum of twenty dollars, as fixed by an ordinance of the common council of the said mayor, aldermen and commonalty of the city of New York; that prior to the year 1894 the defendant the Third Avenue Railroad Company duly and annually paid to the said mayor, aldermen and commonalty of the city of New York the sum of twenty dollars per annum for each car run and operated upon its lines of railroad in the city of New York; that on or about April 3, 1900, by an instrument dated that day the defendant the Third Avenue Railroad Company granted and demised all the certain railroads mentioned and described therein to the defendant the Metropolitan Street Railway Company, for the term of 999 years, said railroads to be used, maintained and operated by the defendant Metropolitan Street Railway Company in accordance with the requirements of the charter and "subject to all debts and liabilities of the party of the first part (meaning The Third Avenue Railroad Company) except debts or liabilities incurred to the party of the second part;" that said lease also contained the following provision: "And said party of the second part (meaning defendant Metropolitan Street Railway Company) further agrees that it shall and will pay, satisfy and discharge all municipal, county, state or government taxes and assessments,

license fees or other charges of any description whatever which during the term hereby granted may be imposed upon the property hereby demised, or any part thereof, or upon any additions or extensions thereof;" that during the years 1894 to 1899 inclusive the Third Avenue Railroad Company used, ran and operated upon its lines of railroad in the city of New York passenger cars for which there were due, and it became liable to pay during said years, car license fees aggregating \$25,750, for which sum the plaintiff demands judgment against the defendants.

The defendants interposed a joint demurrer alleging as a ground thereof that causes of action have been improperly united; and the Metropolitan Street Railway Company also interposed a separate demurrer specifying the same objection, and also the objection that the complaint does not state facts sufficient to constitute a cause of action against it. As this second separate demurrer of the defendant the Metropolitan Street Railway Company must be sustained a consideration of the other ground of the demurrer is not necessary. The lease of the Third Avenue Railroad Company to the Metropolitan Street Railway Company demises the railroad property of the Third Avenue Railroad Company "subject to all debts and liabilities" of the Third Avenue Railroad Company with no provision by which there is imposed upon the lessee an obligation to pay such debts and liabilities. The Third Avenue Railroad Company is not dissolved or merged with the Metropolitan Street Railway Company, but is an existing corporation liable for its debts and obligations. The Metropolitan Street Railway Company did not assume the payment of the debts, but accepted a demise of the property subject to the debts and liabilities of the lessor corporation. What was said by Judge EARL in *Mayor v. Twenty-third St. R. Co.* (113 N. Y. 311) is applicable here: "What it (the lessee) is bound to do under the lease is expressly stipulated therein, and there is no stipulation or provision imposing upon it the duty or obligation to pay the percentage. There is nothing in the general laws of the State which imposes this burden upon the defendant as lessee. \* \* \* We cannot, therefore, find the defendant's obligation to pay this percentage in any particular language used in the lease or in any statute." The subsequent provision in the lease by which the lessee

company agreed that "it shall and will pay, satisfy and discharge all municipal, county, state or government taxes and assessments, license fees or other charges of any description whatever which during the term hereby granted may be imposed upon the property hereby demised, or any part thereof," applied to the license fees that should become due after the execution of the lease, this clause having, however, no relation to the obligations of the Third Avenue Railroad Company existing at the time of the execution of the lease. Under this provision there can be no doubt but that the lessee company would be liable for all license fees accruing to the city after the execution and delivery of the lease; but it relates only to such license fees and not to existing liabilities for license fees that had accrued prior to its execution. The question presented in the case of *Mayor v. Twenty-third St. R. Co. (supra)* was as to the liability of the lessee company for a percentage of the gross receipts under the charter of the lessor company that accrued after the execution and delivery of the lease; and there the court held that accepting a lease of all the property of the corporation it was accepted subject to the legal obligations to pay a percentage of its gross earnings to the city of New York, the court saying: "When the defendant took the place of the lessor corporation, it became obligated to take and retain one per cent of the fares received by it to and for the use of the city, and to make payment thereof to the city." It was only a percentage of the fares received by the lessee corporation after it had taken possession of the demised property that it was bound to pay to the city, not a percentage of the gross receipts which the lessor corporation had received prior to the execution and delivery of the lease. We think that the complaint stated no cause of action against the defendant the Metropolitan Street Railway Company, and that its separate demurrer should have been sustained. It is not claimed upon this appeal that the complaint did not state a good cause of action against the defendant the Third Avenue Railroad Company.

The judgment appealed from must, therefore, be reversed and the demurrer of the Metropolitan Street Railway Company sustained, with costs in this court and in the court below.

As to the Third Avenue Railroad Company, judgment affirmed with costs, with leave to the Third Avenue Railroad Company to



withdraw demurrer and answer on payment of costs in this court and in the court below.

VAN BRUNT, P. J., PATTERSON, HATCH and LAUGHLIN, JJ., concurred.

Judgment reversed and demurrer of Metropolitan Street Railway Company sustained, with costs in this court and in the court below. As to the Third Avenue Railroad Company judgment affirmed, with costs, with leave to the Third Avenue Railroad Company to withdraw demurrer and answer on payment of costs in this court and in the court below.

RAYMOND CONNOR, by his Guardian ad Litem, BRIDGET KELLIHER, Respondent, v. METROPOLITAN STREET RAILWAY COMPANY, Appellant.

*Negligence—*injury from a street car striking the rear of a wagon, which, at the same time, was struck by another car and forced back against the former one—when the question as to the motorman's negligence is not one of law—a question is presented for the jury—form of exceptions to a charge.

In an action brought against a street railway company to recover damages for personal injuries sustained by the plaintiff, the plaintiff's testimony tended to show that he was riding upon the rear of a truck, which was traveling north-erly on the defendant's north-bound track; that while in this position one of the defendant's north-bound cars approached from behind and collided with the truck, injuring him. The testimony given by the defendant tended to show that as the north-bound car approached the truck the motorman thereof signaled the driver of the truck to leave the tracks, and that while the driver was in the act of leaving the track one of the defendant's south-bound cars col-lided with the truck and forced it back against the north-bound car, thus causing the injuries.

The court charged, at the plaintiff's request: "If the north-bound motorman, by the exercise of reasonable care, could or should have seen that there was dan-ger of a collision between the south-bound car and the van, and yet kept his car up to within a few feet of the van, so that the van was driven back onto his car, then he was negligent."

*Held*, that if the jury found the facts to be as stated in the charge, it was for them to say whether or not such facts constituted negligence on the part of the motorman, and that it was error for the court to charge that, if they found such facts, the defendant was negligent, as matter of law.

Where, at the close of a jury trial, the plaintiff's counsel submits seventeen requests to charge, and the court states that he will charge "the requests one, two, three, four, five, six, seven, eight, nine, ten, eleven, twelve and fourteen," an exception taken by the defendant in the following form, "I except to your Honor's charging the following requests to charge made by the plaintiff — first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth and thirteenth and fourteenth," is sufficiently specific to enable him to bring up for review, on appeal, any of the requests specified in the exception. O'BRIEN, J., dissented.

APPEAL by the defendant, the Metropolitan Street Railway Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 15th day of April, 1902, upon the verdict of a jury for \$1,000, and also from an order entered in said clerk's office on the 28th day of April, 1902, denying the defendant's motion for a new trial made upon the minutes.

*Charles F. Brown*, for the appellant.

*I. Newton Williams*, for the respondent.

McLAUGHLIN, J. :

This action was brought to recover damages for personal injuries alleged to have been caused by defendant's negligence.

The plaintiff, on the 4th of August, 1899, then about fourteen years of age, was injured by a collision between one of defendant's cars and a truck on which he was riding. The testimony on the part of the plaintiff, so far as it relates to the collision, tended to show that the plaintiff sat on the rear of the truck, which was going in a northerly direction on defendant's tracks, and while in this position, one of the defendant's cars came up behind and collided with it; and before he had any chance to escape and without any fault on his part, he sustained the injuries complained of. The testimony on the part of the defendant tended to show that as the car came up behind the truck, the motorman of the car signaled for the driver of the truck to leave the tracks, and in obedience thereto he did commence to leave the tracks; that while in the act of doing so the horse attached to the truck, or else the truck itself, came into collision with one of defendant's south-bound cars, and by reason thereof the truck was forced back against and came in collision with the north-bound car, and thus the plaintiff was injured. It matters little which contention be taken as the true one; it is quite

clear a question of fact was presented as to defendant's negligence, as well as the contributory negligence of the plaintiff, and we should have no hesitancy in affirming the judgment were it not for an error in the charge. The trial court, at plaintiff's request, charged the jury: "If the north-bound motorman, by the exercise of reasonable care, could or should have seen that there was danger of a collision between the south-bound car and the van, and yet kept his car up to within a few feet of the van, so that the van was driven back onto his car, then he was negligent." The defendant excepted to the instruction thus given and we think the exception well taken.

If the jury found that the facts stated in the request were established by the evidence, then it was for them to say whether or not such facts constituted negligence on the part of the motorman, taking into consideration all of the facts and circumstances surrounding the collision. It was error for the court to charge, as matter of law, that if they found such facts, then the motorman was negligent. (*Kellegher v. Forty-second St., etc., R. R. Co.*, 171 N. Y. 309.) It would seem as though the motorman would have a right to assume, when the driver of the truck started to leave the tracks, that he would do so in such a way as not to collide with one of the defendant's cars going in an opposite direction. This would certainly be the natural inference and one which a reasonably prudent man would have the right to make, and the fact that he acted upon this assumption, by bringing his car close to the truck, so that he might proceed with it as soon as the truck had left the tracks, did not make him negligent *per se*. At most it was for the jury to say whether or not his act was a negligent one. That the defendant was prejudiced by this instruction was sufficiently evidenced by the verdict rendered.

For the error thus committed the judgment and order must be reversed, and a new trial ordered, with costs to the appellant to abide the event.

VAN BRUNT, P. J., and HATCH, J., concurred; O'BRIEN, J., dissented.

INGRAHAM, J. (concurring):

I concur with Mr. Justice McLAUGHLIN, and only wish to call attention to the exception necessary to justify a review of the

charge to the jury. In this case, after the charge was finished, the court said that he had been requested by the defendant to charge certain propositions which he charged, and "on behalf of the plaintiff I will charge requests one, two, three, four, five, six, seven, eight, nine, ten, eleven, twelve, thirteen and fourteen. Fifteenth, sixteenth and seventeenth, I decline to charge, to which you are entitled to an exception." The requests that the court charged are then stated in the record which included the tenth request. Counsel for the defendant then, after excepting to specific portions of the charge, said: "I except to your Honor's charging the following requests to charge made by the plaintiff — first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth and thirteenth and fourteenth." Here the court specifically charged the tenth request made by the plaintiff, and the defendant specifically excepted to the charge of that request.

By section 995 of the Code of Civil Procedure it is provided that an exception must be taken at the time when the ruling is made, unless it is taken to the charge given to the jury; in which case it must be taken before the jury have rendered their verdict. This exception comes within the last clause of this section, as it was an exception taken to the charge of the court to the jury, and upon the record it appears to have been taken before the jury had rendered their verdict. It was taken to a specific charge made at the request of the plaintiff, and the exception specified the particular request that the court had charged to which the defendant excepted. It is undoubtedly the rule that to entitle a defeated party to review a proposition contained in a charge to the jury, there must be a specific exception to the charge so that the attention of the court is directed to the express proposition to which counsel desires to except; or where there is a refusal to charge a request, there must be a specific exception to the ruling of the court refusing to charge the specific request. A general exception to the charge without specifying the particular proposition to which it is desired to except manifestly raises no question upon a review of the judgment; nor where several requests to charge have been presented, to some of which the court has acceded and to others refused, does a general exception to the refusal to charge as requested present a question for review. Such an exception is too general. In *Smedis v. Brook-*

*lyn & Rockaway Beach R. R. Co.* (88 N. Y. 14) at the close of the evidence counsel for the defendant presented to the court fifteen separate requests to charge. The court charged substantially as requested, and then, at the close of the charge, declined to charge except as already charged, to which refusal as to each of such requests the defendant's counsel then and there excepted. The court said: "We think, for the reason there stated, that the court properly disposed of the questions raised by these requests to charge. But if the court erred in refusing to charge one or more of the propositions as requested, there is no sufficient exception to such refusal. It is well settled that where several requests to charge are submitted to the court, some of which are charged as requested, some charged in a modified form, and others not charged, an exception taken in the form in which it appears in this case cannot be sustained. The exception must be more specific and point out the particular request to which it is intended to apply."

In *Newall v. Bartlett* (114 N. Y. 399) it appeared that at the close of the evidence the defendant's counsel presented to the court eight requests to charge the jury. Without making any ruling upon these requests, the court proceeded to deliver his charge. At its close the defendant's counsel requested the court to charge upon two additional requests, which the court charged. The counsel then excepted to one instruction embodied in the charge as delivered. The case then shows that the court refused to charge the defendant's requests except as already charged, and the defendant's counsel took an exception to the refusal to charge as to each and every one of said requests. The court said: "It does not appear which of the requests had been charged, and consequently we are not advised as to which of the requests the exceptions apply. To raise any question upon the ruling of the trial court for review in this court, the exception must be specific and point out the particular request to which it is intended to apply."

In *Read v. Nichols* (118 N. Y. 224) it appeared that at the close of the evidence the counsel for the plaintiff presented to the court thirteen separate requests to charge. Some were charged as requested, some were charged in a modified form and others refused. At the close of the charge counsel stated that he excepted to the refusal to charge as requested by plaintiff's counsel in so far as

the court did refuse, and to each of the refusals to charge as requested. It was held that this exception was not sufficiently definite and specific to present a question for review. In *Huerzeler v. C. C. T. R. R. Co.* (139 N. Y. 490) it appeared that at the close of the evidence the trial court charged the jury, and there were many requests by both sides to charge, some of which were granted and some refused. After the charge was finished and the jury had retired counsel for the defendant excepted to the granting of the requests on the other side, and a refusal to charge those of the defendant's counsel. There was no other exception to the charge or refusal to charge, and it was said: "It is conceded by the learned counsel for the defendant that this general exception was wholly insufficient to present any question for review in this court, and so we have uniformly held" (citing the cases to which attention has been called). To the same effect is *Piper v. N. Y. C. & H. R. R. R. Co.* (89 Hun, 75). This last case was reversed by the Court of Appeals (156 N. Y. 224), but that reversal was upon the ground that the plaintiff was guilty of contributory negligence, and for that reason it was held that the complaint should have been dismissed.

The rule to be adduced from these cases requires that a party excepting to a charge to a jury must, by some exception, point to the specific proposition which the court has charged or refused to charge, or to a specific ruling on a refusal to charge to which counsel supposed himself entitled. Where several requests are made, some of which are charged and some refused, the attention of the court must be called to the ruling refusing a specific request by an exception taken to that ruling; an exception generally to the refusal of the court to charge as requested is not sufficiently specific. In *McKinley v. Metropolitan Street R. Co.* (77 App. Div. 256), after the requests to charge had been presented on both sides, they were ruled upon separately, and when counsel for the defendant asked the court, "And now, with respect to exceptions to those portions of your Honor's charge," the court, interrupting, said: "You may take them after the jury have retired; either side may do that." After the jury retired counsel for the defendant said, "Your Honor will allow me an exception in due form to each request which is refused and to each request which was modified," to which the court answered, "Yes," and we held that this request was

so general that, if simply taken and entered upon the record without the acquiescence of the court, it might be unavailing; but that, as the court, having interrupted counsel when about to take specific exceptions, subsequently gave him an exception to the refusal of the court to charge his requests, that method being acceptable to the court and entered in the record as such, it was sufficient to raise the question as to the right of the defendant to have his specific requests charged which the court had refused to charge. We wish to call attention to this rule that to entitle counsel to review a charge as actually made there must be a specific exception to the portion of the charge which is claimed as error sufficiently definite to call the attention of the trial judge to the specific portion of the charge excepted to, and that where it is sought to review the refusal of the court to charge a request there must be a specific exception to the refusal to charge the particular request; that a general exception to the refusal to charge as requested by the party taking the exception does not present a question for review on appeal unless the court directs such course to be pursued and authorizes the entry of the exception to be made in that form.

HATCH, J., concurred.

O'BRIEN, J. (dissenting):

I am unable to concur in the conclusion reached by the majority of the court in this case because under the authorities I think the exception upon which the case is reversed is not properly before us for consideration, and, therefore, is not available. At the conclusion of the charge to the jury some seventeen requests were presented by the plaintiff, and the trial judge stated those which he would charge and the numbers of those he declined to charge, these latter not appearing in the record. The defendant then made certain requests, and, finally, just before the case went to the jury, the defendant's counsel said: "I except to your Honor's charging the following requests to charge made by the plaintiff—first, second, \* \* \* tenth, eleventh," etc. In this way only was any exception taken to the tenth charge, which is the one in question. In *Piper v. N. Y. C. & H. R. R. Co.* (89 Hun, 75, 76) the court said: "At the close of the charge the defendant presented to the court twenty-eight requests, some of which were charged and some

refused. The defendant excepted to each of the charges made by the court at the request of the plaintiff and to each qualification of those requests and to each refusal to charge either of the propositions requested by the defendant to be charged. These exceptions are wholly insufficient to present any question for review." And in the opinion written by Mr. Justice McLAUGHLIN, in *Benedict v. Deshel* (77 App. Div. 276), it was held that, where a number of requests were made by the plaintiff and refused by the court, and the plaintiff's counsel said, "I except to each of your Honor's refusals to charge to\* my several requests," the exception was not so taken as to present any question for review. The only difference between the form of the exception in that case and in the case at bar is that here the numbers of the requests were mentioned; but this did not point out any particular misstatement so as to afford the trial court the opportunity to correct any error, and it is the failure to so specify the objection made to the refusal that constitutes the vice in such exceptions.

I think, therefore, that the judgment appealed from should be affirmed, with costs.

Judgment and order reversed and new trial ordered, costs to appellant to abide event.

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NELLIE GARVEY, Appellant, v. THE UNITED STATES FIDELITY AND GUARANTY COMPANY, Respondent, Impleaded with FRANCIS J. HORGAN, as Ancillary Executor of RICHARD GARVEY, Deceased, and Others.

*Heir at law claiming that a will admitted to probate was invalid because of her ancestor's incapacity — the invalidity of devices to charitable corporations must be pleaded — right of an heir at law, where there is an equitable conversion into personality — a decree of another State admitting a will to probate — duty of a claimant to assert rights in that State — a surety on an executor's bond cannot be sued until the executor is in default.*

The complaint in an action brought by Nellie Garvey against Francis J. Horgan as ancillary executor of the estate of Richard Garvey, deceased, the United States Fidelity and Guaranty Company and others, alleged that Richard Garvey died a resident of the State of Massachusetts, leaving a pretended last will and

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\* *Sic*



testament which was void by reason of the testator's incapacity to make the same; that the plaintiff was the sole heir at law and next of kin of Richard Garvey, deceased, who was one of the heirs at law of Andrew J. Garvey, deceased; that the said Andrew J. Garvey died seized of certain lands situate in the city of New York, and that, by terms of his will, which was admitted to probate in the county of New York, he devised such real estate to a trustee upon certain trusts and gave the trustee power to sell and convey such real estate; that the trustee exercised the power of sale and that subsequently all of the parties interested under the will, except this plaintiff, entered into an agreement that the proceeds of the sale of the property should be divided and distributed among them in specified proportions; that, if Richard Garvey had been alive, he would have been entitled to receive, pursuant to this agreement, the sum of \$29,212.68.

The complaint further alleged that the pretended will of Richard Garvey was admitted to probate in the State of Massachusetts and that ancillary letters testamentary were thereafter issued to the executor named therein by one of the surrogates of the county of New York; that thereupon the said sum of \$29,212.68 was paid to such executor notwithstanding that the plaintiff had previously demanded that payment of such sum be made to her; that the United States Fidelity and Guaranty Company was the surety upon the bond of the executor named in the will of Richard Garvey and was in possession of the fund. The relief demanded was that the plaintiff have judgment against the defendants for the amount of the fund.

*Held*, that, in the absence of an allegation to that effect in the complaint, the plaintiff could not raise the question whether devises to charitable corporations contained in the will of Andrew J. Garvey aggregated more than one-half of the value of the testator's estate and were, therefore, invalid;

That, aside from this question, the will of Andrew J. Garvey worked an equitable conversion of all the testator's real estate into personalty and that nothing, therefore, descended under the will of Andrew J. Garvey which the plaintiff could take as heir at law;

That the decree of the Massachusetts court admitting the will of Richard Garvey to probate was conclusive in the State of New York, and that, as long as such decree remained in force, the plaintiff, who was not mentioned in the will, was not entitled to any portion of the estate of the said Richard Garvey;

That the plaintiff was obliged to assert whatever rights she had in the fund in question in a proceeding in the courts of the State of Massachusetts;

That the plaintiff could not maintain an action against the surety upon the bond of the executor named in the will of Richard Garvey until the liability of the executor to respond to her had been established and he had failed to comply with the direction to pay over the fund.

APPEAL by the plaintiff, Nellie Garvey, from an interlocutory judgment of the Supreme Court in favor of the defendant, The United States Fidelity and Guaranty Company, entered in the office of the clerk of the county of New York on the 6th day of June,

1902, upon the decision of the court, rendered after a trial at the New York Special Term, sustaining the said defendant's demurrer to the amended complaint.

*Nelson J. Waterbury*, for the appellant.

*Charles H. Fuller*, for the respondent.

HATCH, J. :

The theory of the complaint in this action is that the plaintiff is entitled to recover as the sole heir at law and next of kin of Richard Garvey, who was an uncle of the blood and one of the heirs at law of Andrew J. Garvey, deceased. The complaint avers that Richard Garvey died a resident of the city of Boston in the State of Massachusetts on or about the 22d day of September, 1898, leaving a pretended last will and testament, which was void by reason of the testator's incapacity to make the same; that Andrew J. Garvey was at the time of his death seized of certain lands and tenements situate in the city and county of New York, and that he left a last will and testament which was duly admitted to probate by the surrogate of the county of New York as a will valid to pass real and personal property; that by virtue of its provisions and codicil thereto attached he devised all of his said lands and property to a trustee named in the will upon certain trusts therein specified; that the said will and codicil gave to the said trustee full and complete power to sell and convey the whole of the real estate devised by the will; that after the admission of the will to probate the trustee exercised the power of sale contained therein and sold the property; that after the said will of Andrew J. Garvey was admitted to probate all of the persons and corporations entitled to take thereunder, or claiming an interest under the will, except this plaintiff, entered into an agreement in writing before the commencement of this action whereby they agreed that the proceeds of the sale of said property should be divided and distributed among the persons and corporations entitled thereto in specified proportions, and that out of the said sums so realized \$29,212.63 became payable to Richard Garvey, had he been alive to receive the same; that the said will of Richard Garvey was procured to be probated by the legatees and beneficiaries therein named and by the executor thereof in the Pro-

bate Court of Suffolk county in the State of Massachusetts, and that after such probate an exemplified copy of the will and decree of probate was recorded in the surrogate's office of the county of New York and a decree procured from one of the surrogates of said county for the issuance to the executor therein named of ancillary letters testamentary upon the said estate; that thereupon there was paid over to said executor the aforementioned sum of \$29,212.63 in disregard of plaintiff's rights; that plaintiff demanded said sum of the trustee named in the will of Andrew J. Garvey prior to its payment to the executor; that the United States Fidelity and Guaranty Company, a foreign corporation authorized to transact business in the State of New York, became surety on the bond of the executor of the will of Richard Garvey, and now controls or has some interest in the fund and is in possession of the same. The complaint demands judgment against the defendants for the before-mentioned share, together with the costs of the action.

It is evident that the disposition made of the demurrer by the learned court below is sound and should be sustained upon this appeal. It is nowhere averred in terms in the complaint that the will of Andrew J. Garvey was invalid, nor is such fact made to appear by any of the averments contained therein. Assuming that the devises of property to charitable corporations under such will were of more than one-half of the estate and, therefore, invalid, it would be essential to establish such fact by proof, and a complaint which fails to aver it is bad. (*Garvey v. Union Trust Co.*, 29 App. Div. 513.)

Aside from this consideration, however, it clearly appears from the will of Andrew J. Garvey that it worked an equitable conversion into personalty of all of his real estate. The devise was to a trustee, with power to sell and pay over the proceeds, and the averment of the complaint is that this power was executed, and out of the execution arose the sum which the plaintiff seeks to recover in this action. The proceeds of the property is personalty, unimpressed with any character of real estate. (*Horton v. McCoy*, 47 N. Y. 21; *Kalb-fleisch v. Kalbfleisch*, 67 id. 354.) There was nothing, therefore, which descended under the will of Andrew J. Garvey which the plaintiff could take as heir at law, and no right remains in her which she could enforce in such capacity against such estate or the pro-

ceeds thereof. By the averments of the complaint it appears that the will of Richard Garvey has been admitted to probate in Suffolk county, in the State of Massachusetts. The decree of said court admitting the will to probate is conclusive, and cannot be questioned in this State. (*Mooney v. Hinds*, 160 Mass. 469; *Simmons v. Saul*, 138 U. S. 439.) It is clear, therefore, that the executor named in such will became entitled to take as such, and he alone, so far as the personal estate is concerned, is the legal representative of the heirs at law of Richard Garvey, and the right to have and receive the money is exclusively vested in him. The averments of the complaint are that the money was paid over to such executor, and if the plaintiff has any rights in and to this fund, she is required to invoke such legal remedies as may exist for the recovery thereof from the executor; but the money having been paid according to law to the person entitled to the custody thereof, no right of action exists in her favor against the surety upon the bond of the executor until the liability of the executor to respond to her has been established, and he has failed to comply with a direction to pay over the same.

It also appears by the averments of the complaint that under and by virtue of the terms of the will of Richard Garvey the plaintiff herein is not entitled to have or receive any of such estate. She is not named therein as legatee, nor does she take anything thereunder. So long, therefore, as the probate of this will stands, she is concluded from taking anything, and as the testator resided in the State of Massachusetts, and the will is duly admitted to probate in that State and the executor has qualified thereunder, she must be limited in whatever rights she has in and to this fund to a proceeding in the courts of Massachusetts. It is sufficient to say now that not only does the complaint fail to show a case entitling her to recover this fund, or any part of it, as heir at law or next of kin of Andrew J. Garvey, but by its affirmative averments she has succeeded in showing that in each capacity she has no standing to maintain this action. In addition thereto, she seems to have gone further, and also by affirmative averments established that she has no right to have or receive any of this fund. So long as the decree of probate of the will of her ancestor stands unreversed, she is not entitled to take in any capacity whatever.

It follows that the interlocutory judgment should be affirmed, with costs, and that the plaintiff be permitted to plead over within twenty days upon payment of the costs of this appeal and in the court below.

VAN BRUNT, P. J., PATTERSON, INGRAHAM and LAUGHLIN, JJ., concurred.

Judgment affirmed, with costs, with leave to plaintiff to plead over on payment of costs in this court and in the court below.

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THE PEOPLE OF THE STATE OF NEW YORK, Appellant, v. ROBERT L. MARTIN and HARRY VELTHUSEN, Respondents.

*Perjury — section 96 of the Penal Code is not limited to affidavits required by the laws of the State of New York — indictment charging two persons with the crime of perjury, and also that one of them counseled the acts of the other — it charges both as principals with the commission of one offense.*

Section 96 of the Penal Code, which provides: "A person who swears \* \* \* that any \* \* \* affidavit \* \* \* by him subscribed is true \* \* \* on any occasion in which an oath is required by law \* \* \* or may lawfully be administered, and who \* \* \* on such \* \* \* occasion willfully and knowingly \* \* \* deposes \* \* \* falsely in any material matter, or states in his \* \* \* affidavit \* \* \* any material matter to be true which he knows to be false, is guilty of perjury," is not limited in its operation to affidavits and oaths required by the laws of the State of New York, but extends to an oath or affidavit required by the laws of a sister State and authorized by the laws of such sister State to be taken in the State of New York.

An indictment charging two persons with the crime of perjury, which first avers the commission of the offense by both persons, and then avers that one of them was actually present, aiding, counseling, advising and procuring the said acts, oaths and willful purposes of the other, does not allege the commission of two offenses, but simply the commission of a single offense in which both the defendants were principals.

APPEAL by the plaintiff, The People of the State of New York, from an order of the Court of General Sessions of the Peace in and for the city and county of New York, entered in the office of the clerk of said court on the 9th day of June, 1902, allowing a demurrer filed by each of the defendants to the indictment charging them with the crime of perjury.

The indictment is as follows:

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“COURT OF GENERAL SESSIONS OF THE PEACE, IN AND FOR THE  
COUNTY OF NEW YORK.

“The People of the State of New York  
*against*  
“Robert L. Martin and Harry Velthusen.

“The Grand Jury of the County of New York, by this indictment, accuse Robert L. Martin and Harry Velthusen of the crime of perjury, committed as follows :

“Heretofore, to wit, on the 15th day of May, in the year of our Lord one thousand nine hundred and one, the said Robert L. Martin and the said Harry Velthusen, each late of the Borough of Manhattan, of the City of New York, in the County of New York, aforesaid, were respectively, the said Robert L. Martin, president, and Harry Velthusen, secretary, of the Delaware Surety Company, a corporation duly organized and existing under the laws of the State of Delaware.

“And then and there and on the day and year aforesaid it was required by law and by the general corporation law of the State of Delaware that the president, with the secretary or treasurer, of every corporation organized and existing under the laws of the said State of Delaware should, upon payment of the capital stock of such corporation, make a certificate, stating whether the same had been paid in in cash or by the purchase of property, and stating also the total amount of capital stock paid in, which certificate should be signed and sworn, or affirmed to by the president and secretary, or treasurer, and further, providing that the same said certificate, so signed and sworn, or affirmed to, should be filed in the office of the Secretary of State of the said State of Delaware.

“And then and there and on the said 15th day of May, in the year aforesaid, one Thomas Adam, Jr., was a notary public duly appointed, sworn and qualified in and for the County of New York, aforesaid, and thereby duly authorized and empowered to administer oaths and take affidavits ;

“And then and there, and on the said 15th day of May, in the year aforesaid, at the borough and county aforesaid, the said Robert L. Martin, as president, as aforesaid, of the said corporation, as aforesaid, and Harry Velthusen, as secretary of the said corporation

aforesaid, appeared before the said Thomas Adam, Jr., notary public as aforesaid, and did then and there, each in his own proper handwriting duly subscribed, the said Robert L. Martin, as president, and the said Harry Velthusen, as secretary, the certain certificate, so as aforesaid required and provided for by law, and by the said general corporation law of the said State of Delaware, which said certificate was then and there as follows, to wit:

"We, Robert L. Martin, President, and Harry Velthusen, Secretary of the Delaware Surety Company, a corporation created by and under the laws of the State of Delaware, do hereby

"Certify that the entire capital stock of the Delaware Surety Company, said corporation, of one million dollars has been paid in in cash.

"NEW YORK, *May 15th*, 1901.

"DELAWARE SURETY COMPANY,

"by ROBERT L. MARTIN,

"*President.*

"HARRY VELTHUSEN,

"*Secretary.*

"Delaware Surety Company

"Incorporated, 1901.

"[Ten cent revenue stamp cancelled.]

"And did then and there produce, present and exhibit the same said written instrument and certificate as aforesaid to the said Thomas Adam, Jr., notary public as aforesaid, and he, the said Robert L. Martin, and he, the said Harry Velthusen, did then and there, at the borough and county aforesaid, on the said 15th day of May, in the year aforesaid, produce, present and exhibit to the said Thomas Adam, Jr., notary public as aforesaid, a certain affidavit in writing, duly signed and subscribed by him, the said Robert L. Martin, in his own proper handwriting, touching the truth of the said certificate aforesaid, so subscribed by them, the said Robert L. Martin and the said Harry Velthusen, as aforesaid, which said affidavit in writing was then and there as follows, to wit:

"STATE OF NEW YORK, } ss.

"County of New York, }

"Robert L. Martin and Harry Velthusen being severally duly sworn, depose and say, each for himself: That they have read the

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foregoing certificate and know the contents thereof, and the same is true to their own knowledge.

"ROBERT L. MARTIN,  
"HARRY VELTHUSEN.

"Sworn to before me this }  
15th day of May, 1901. }

"THOMAS ADAM, JR.,  
"Notary Public N. Y. Co.

"THOMAS ADAM, JR., }  
"Notary Public }  
"New York County. }

"And it was then and there, and on the said 15th day of May, in the year aforesaid, required and provided for by law, and by the said general corporation law of the said State of Delaware, that the said certificate, so made, signed and subscribed by the said Robert L. Martin as president as aforesaid, and the said Harry Velthusen, as such secretary, as aforesaid, should be sworn or affirmed to by each of them before the same should be filed in the office of the Secretary of State of the said State of Delaware.

"And thereupon, and at the time and place aforesaid, and on the day aforesaid, before Thomas Adam, Jr., such notary public as aforesaid, at the borough and county aforesaid, the said Robert L. Martin was duly sworn and did take his corporate oath by and before the said Thomas Adam, Jr., such notary public aforesaid, touching the truth of the matters contained in the said affidavits so, as aforesaid, in writing, and subscribed by him, the said Robert L. Martin, the said Thomas Adam, Jr., such notary public, having full and competent authority and power to administer such oath to them, and each of them, in that behalf;

"And the said Robert L. Martin, being so sworn, as aforesaid, upon his corporal oath aforesaid, did then and there, and by the said affidavit in writing, so signed and subscribed by him as aforesaid, falsely, corruptly and knowingly swear and depose that each and every matter therein stated was true to his own knowledge.

"And thereupon, and on the day and in the year aforesaid, at the borough and county aforesaid, the said Robert L. Martin did deliver the said certificate and the said affidavit, so as aforesaid signed, subscribed and sworn to by him, the said Robert L. Martin,



to another, with intent that it be uttered and published as true; and the same said certificate and affidavit were thereafter filed in the office of the Secretary of State of the said State of Delaware, the said affidavit having been signed and sworn to by the said Harry Velthusen, the said secretary of the said corporation, who had theretofore, as aforesaid, subscribed the said certificate.

"WHEREAS, in truth and in fact, there was not then and there, and there had not been paid in in cash one million dollars, as, in and for payment of the capital stock of the said Delaware Surety Company, the said corporation, as aforesaid, as they, the said Robert L. Martin and the said Harry Velthusen, and each of them, then and there well knew;

"And WHEREAS, in truth and in fact, the said Robert L. Martin did not then and there know that there was or had been paid in, in cash, one million dollars, as, in and for payment of the capital stock of the said Delaware Surety Company, the said corporation as aforesaid, as they, the said Robert L. Martin and Harry Velthusen, then and there well knew.

"And the said Harry Velthusen, then and there and at all the times aforesaid, at the said borough and county aforesaid, and on the day aforesaid, was actually present aiding, counseling, advising and procuring the said acts, oaths and wilful perjury, as aforesaid, on the part of the said Robert L. Martin.

"And so the Grand Jury aforesaid do say that the said Robert L. Martin and the said Harry Velthusen, in the manner and form aforesaid, and by the means aforesaid, did wilfully, feloniously, corruptly, knowingly and falsely commit the crime of wilful and corrupt perjury; against the form of the statute in such case made and provided, and against the peace of the People of the State of New York and their dignity.

"EUGENE A. PHILBIN,  
"District Attorney."

*Howard S. Gans*, for the appellant.

*Franklin Bien*, for the respondents.

HATCH, J.:

It appears by the record upon this appeal that the learned recorder made disposition of the question presented by the demurrer, based

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upon the conclusion that the crime of perjury, as defined in section 96 of the Penal Code, had not been committed.

The reasoning which led to his conclusion in this respect seems to have been that the oath to the certificate, averred to have been taken in the indictment, was not required by any law of the State of New York, and did not, therefore, fall within the language or meaning of the statute, and that not being in pursuance of, or authorized by, the laws of this State, the oath thereto was not lawfully administered; and, consequently, the crime of perjury could not be predicated thereon.

Eliminating those provisions of section 96 of the Penal Code which have no applicability to the offense as it is averred to have been committed in the indictment, the law defining perjury reads: "A person who swears \* \* \* that any \* \* \* affidavit \* \* \* by him subscribed is true \* \* \* on any occasion in which an oath is required by law \* \* \* or may lawfully be administered, and who \* \* \* on such \* \* \* occasion willfully and knowingly \* \* \* deposes \* \* \* falsely in any material matter, or states in his \* \* \* affidavit \* \* \* any material matter to be true which he knows to be false, is guilty of perjury."

It is averred in the indictment that by the general corporation laws of the State of Delaware it was required by law that the president with the secretary, or treasurer, of every corporation organized and existing under the laws of such State, should, upon payment of the capital stock of the corporation, make a certificate, stating whether the same had been paid in in cash, or by purchase of property, and stating also the amount of the capital stock paid in, which certificate should be signed and sworn, or affirmed to, by the president and secretary, or treasurer, and after being so signed and sworn to, should be filed in the office of the Secretary of State of the State of Delaware. By further averments it is made to appear that this certificate was in conformity to the law of such State, and that after having been so taken, as averred in the indictment, it was filed in the office of the Secretary of State of the State of Delaware.

It is evident, therefore, that these averments of the indictment are sufficient to show that the oath was required by the law of

Delaware, and if such certificate, by the laws of that State, was authorized to be verified and sworn to in the jurisdiction of a sister State, and could be filed with the Secretary of State when so taken, with the same force and effect as though taken in the State of Delaware, then it would clearly appear that such an oath might be lawfully administered within this State. While it is not averred in terms in the indictment that such an oath is authorized by the laws of the State of Delaware to be taken in a foreign jurisdiction, and, when properly authenticated, filed therein with the same force and effect as though taken within the jurisdiction of that State, yet it is averred that an oath of this character was required, that it was taken and subsequently filed with the officer as authorized by law. The fair inference which arises from the averments of the indictment in this respect is that as the certificate was received and filed in the State of Delaware, it was, therefore, effectual to accomplish the purpose for which it was taken and filed, as it will not be presumed that it would be received and filed in such office unless it was legally sufficient to accomplish the purpose which the filing required.

By subdivision 1 of section 85 of the Executive Law (Laws of 1892, chap. 683, as amd. by Laws of 1894, chap. 88) it is provided that a notary public has authority to exercise such powers and dutise as by the law of nations and according to commercial usage, or by the laws of any other government, State or country, may be performed by notaries. And by subdivision 2 such notary is authorized to administer oaths and affirmations and take affidavits.

It is, therefore, evident that the notary was authorized to take the affidavit attached to the certificate in question, as it presented an application to him to act in his official capacity, and the oath required to be taken was such as he might lawfully administer. It was the contention below, and is urged by the respondents on this appeal, that section 96 of the Penal Code must be construed as authorizing only the taking of an affidavit where such affidavit was required by the laws of this State, and if not so required, perjury could not be predicated thereon, even though it be conceded to be false. Such is not the language, however, of section 96, which we have heretofore quoted. Therein the provision is that the affidavit so subscribed and taken is true on any occasion in

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which an oath is required by law. If the provision of the statute stopped here, it might well be argued that it is limited in its operation to such affidavits and oaths as are required to be taken by the laws of this State, and could not be extended so as to cover an oath required to be taken for use in a foreign jurisdiction, but the definition does not stop here. Its further language is "or may lawfully be administered." This language is in the disjunctive and indicates clearly that two conditions are contemplated. One where the oath is required by the laws of this State, and the other where it may lawfully be administered. To limit this language as applying only to an oath required by the law of this State is to render nugatory and of no effect the provision in relation to those oaths which may be lawfully administered. It is evident that if the law of the State of Delaware authorized the taking of the affidavit averred in the indictment within this jurisdiction, and when so taken force and effect was given to it in such State, then it would seem to follow that the oath attached to such affidavit might be lawfully administered within the jurisdiction of this State, as the exercise of such authority by the notary is authorized by the statute to which we have called attention. Therein he is authorized to administer oaths and affirmations and take affidavits. The act upon the part of the notary, therefore, was a lawful act and would seem to come fairly within the terms of the statute and be an affidavit to which he might lawfully administer the oath. This brings the affidavit not only within the spirit of the enactment, but also within its literal language. Such language is to be construed as meaning something, and force and effect is required to be given to it. If it be held to mean only where the oath is required to be administered by the laws of the State, then such language was unnecessary and meaningless, as it was not needed to define such authority. The language theretofore used did that clearly, and if that was all the whole clause meant, then the addition is surplusage and adds nothing to the particular requirement. Its language, however, is broad enough in its terms to embrace the case presented by the affidavit averred in the indictment, and if it can be so construed, it is evident that it ought to be. So to construe it does no violence to the provision, but, on the contrary, gives force and effect to all of the language used therein.

The ordinary rule of construction requires this interpretation. Indeed, if it be strictly construed, such construction warrants the interpretation we have placed upon it. (Black Interp. Laws, 282, and cases cited.)

By section 11 of the Penal Code the court is required to construe the provisions thereof according to the fair import of their terms to promote justice and effect the objects of the law.

The present case seems to present every element authorizing a liberal interpretation. The language of the Code seems to authorize it, and in order to effectuate the objects of the law and promote justice, it seems to be required. If force and effect is to be given within the State of Delaware to the affidavit which the indictment presents, and we think such is the fair construction, then it follows that such corporation as is averred to exist in the indictment might become entitled to carry on business within this State when it has conformed to our laws. It may, therefore, come into this State with a certificate, the product of a false oath taken herein, that it has a capital stock of \$1,000,000 paid into its treasury in cash, when in fact it has no such sum, and thereupon be held out by our laws to be responsible. It does not need argument to demonstrate that such a result would permit of the perpetration of the grossest frauds upon the citizens of this State. It would also follow that there could be no prosecution for the offense committed in the foreign jurisdiction, unless the persons taking the oath went into such State and in person filed the affidavit, or unless they voluntarily went within the jurisdiction after it was filed. If they remained within this State and procured the affidavit to be filed by sending it to the secretary or otherwise, and did not at the time of filing go within the jurisdiction of the State, they could not be extradited from this State for such offense, although the affidavit was wholly false. (*People ex rel. Corkran v. Hyatt*, 172 N. Y. 176.) If, under such circumstances, they could not be punished for the crime of perjury committed within this State, or at all, unless they voluntarily surrendered themselves to the foreign jurisdiction, they would receive immunity from punishment, although their act was an offense against the laws of the foreign jurisdiction and worked mischievous results upon the citizens of this State. The courts ought not to be astute under such circumstances in unduly limiting the effect of

penal provisions, and when a case is found which comes within the letter of the statute under a reasonable interpretation and entirely within its spirit it should be upheld. Nor are we lacking in authority in support of the interpretation of which we think this statute susceptible. At common law perjury was defined to be the taking of "a wilful false oath by one who, being lawfully required to, depose the truth in any proceeding in a *course* of justice, swears absolutely in a matter of some consequence to the point in question, whether he believed or not." (2 Archb. Cr. Pr. & Pl. [Pomeroy's Notes] 1714.)

The statute of the State of Massachusetts codifies and adopts this definition. (Pub. Stat. Mass. [1882], p. 1158.)

In *Commonwealth v. Smith* (11 Allen, 243) a case was presented where the defendant was charged with the crime of subornation of perjury in procuring one Northrup to commit the crime of perjury in giving false answers to certain questions propounded to him upon a commission, issued out of the Superior Court of the city of New York in an action pending therein, which was at issue, to take testimony in the State of Massachusetts. For subornation of perjury committed in the execution of the commission the defendant was indicted, tried and convicted. Upon an appeal from the judgment of conviction it was urged in his behalf, among other things, that the commissioner was not authorized by the law of Massachusetts to take such depositions. The general statute of Massachusetts provided that such a commission might be taken before a justice of the peace in the State, and it was held that as the deposition was executed before a person authorized to administer oaths by the law of the State of Massachusetts the crime of perjury could be committed, even though there was no law specially authorizing such an oath to be administered when the testimony so given was to be used in a foreign jurisdiction. The oath taken in the execution of the commission was held to be taken in the course of justice, and as a justice of the peace was authorized to administer the oath, the crime of perjury could be predicated thereon. The two cases in principle are precisely similar. In the indictment now before us we have a case where the officer taking the affidavit was authorized by express law to take an affidavit. When so taken it might be and was used in evidencing an act required by law to be evidenced in a foreign

jurisdiction. If perjury could be predicated of the false oath given upon the execution of the deposition, so in like manner perjury can be predicated of the taking of the false affidavit, as both rest upon the same principle and both were taken to evidence a fact in a foreign jurisdiction, required by the law of such foreign State. The same principle was decided adversely to the contention of the respondent in *Stewart v. State of Ohio* (22 Ohio St. 477). Those cases are decisive in principle of the interpretation which we have placed upon this statute.

The objection that the indictment is bad in charging in a single count two separate and distinct crimes is unavailing. The indictment avers the offense against both persons, and then avers that one of them was actually present, aiding, counselling, advising and procuring the said acts, oaths and willful purposes of the other; this does not constitute two offenses, but one in which both are principals. (Penal Code, § 29.)

The only doubt which presents itself to our minds in the construction of the indictment lies in its failure to aver in terms that the law of the foreign State authorized the execution of the certificate and the affidavits, as is averred in the indictment, in a foreign jurisdiction. This difficulty we have already adverted to, reaching the conclusion that as it was filed and apparently acted upon by the officer charged with receiving and filing it in the State of Delaware, it would authorize proof that it was so authorized by the laws of that State.

In sustaining a demurrer to an indictment the judgment becomes a bar to another prosecution unless, by direction of the court, the case be resubmitted to the same or another grand jury. (Code Crim. Proc. § 327.)

The decision of the learned recorder proceeded upon the ground that the defect could not be cured, and, therefore, presumably failed to give a direction for its resubmission. We find no authority which precludes the public prosecutor from resubmitting the case to the same or another grand jury, except where the demurrer has been allowed, otherwise there is no objection of which we are aware which interposes to prevent the resubmission of the case to a grand jury at any time before the Statute of Limitations has run against the offense.

If it be deemed desirable by the public prosecutor to eliminate this question from the indictment, if it be susceptible of elimination, he may do in and about the matter as he is advised.

We conclude that this indictment is a good indictment and states the offense of perjury committed against our laws.

It follows, therefore, that the order allowing the demurrer and the judgment based thereon should be reversed and the defendants directed to plead over to the indictment.

VAN BRUNT, P. J., PATTERSON, INGRAHAM and LAUGHLIN, JJ., concurred.

Order and judgment reversed and defendants directed to plead over to the indictment.

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**WILLIAM W. BRAUER, Appellant and Respondent, v. THE OCEANIC STEAM NAVIGATION COMPANY, LIMITED, Respondent and Appellant.**

*Denial of a motion for a nonsuit, how reviewed — contract by exchange of telegrams contemplating the execution of a final written agreement — enforceable although no writing is executed.*

A motion for a nonsuit made during the course of a jury trial is a part of the trial, and the correctness of the disposition of such motion must be reviewed by an appeal from the judgment or upon a motion for a new trial.

There is no practice which sanctions the entry of a separate order disposing of the motion for a nonsuit and the taking of an appeal therefrom.

Where, by means of telegrams exchanged between two parties, a definite proposition containing all the requirements of a complete contract is made by one and accepted by the other, with the understanding that the agreement will be expressed in a formal writing, the failure to execute the formal writing does not affect the validity of the contract.

The foregoing rule does not apply where part only of the terms of a contract are agreed upon and the parties intend that such terms and others not yet agreed upon shall be expressed in one written agreement.

LAUGHLIN, J., dissented.

APPEAL by the plaintiff, William W. Brauer, from an order of the Supreme Court, made at the New York Trial Term and entered in the office of the clerk of the county of New York on the 18th



day of July, 1902, setting aside a verdict theretofore rendered in favor of the plaintiff and granting a new trial of the action.

Also an appeal by the defendant, The Oceanic Steam Navigation Company, Limited, from an order of the Supreme Court, made at the New York Trial Term and entered in the office of the clerk of the county of New York on the 6th day of September, 1902, denying the defendant's motion for a nonsuit made during the course of the trial.

*Ira D. Warren*, for the plaintiff.

*Everett P. Wheeler*, for the defendant.

PATTERSON, J. :

These appeals are, *first*, by the defendant from an order entered as a separate order, denying its motion for a nonsuit made during the course of the trial, and, *second*, by the plaintiff from an order setting aside a verdict of a jury in his favor in an action brought to recover damages for the alleged violation of a contract which he claims had been entered into between him and the defendant.

The appeal from the first-mentioned order must be dismissed, with costs. We know of no practice which authorizes the entry of such an order. The disposition of a motion made for a nonsuit during the progress of a trial is a part of the trial, and the correctness of the ruling of the court in refusing or granting a nonsuit must be brought up for review by appeal from the judgment or upon a motion for a new trial.

The order setting aside the verdict of the jury must be affirmed for the reason stated in the opinion of the trial judge in granting the defendant's motion for a new trial, namely, that the proof failed to show that a completed contract between the parties was entered into. The learned trial judge submitted to the jury two questions which were answered, and a general verdict was rendered in favor of the plaintiff. That method of submission does not militate against the power of the court to set aside a verdict for the reason assigned by the trial judge. That the plaintiff and the defendant, through its agent, Mr. Kersey, entered into negotiations for a contract by which the plaintiff sought to secure space in the steamships of the defendant for the transportation of cattle across the Atlantic

ocean, and that those negotiations were continued without result up to sometime prior to October 25, 1897, is conceded by both parties. The negotiations anterior to that date related to some, but not all, of the details of the contract. According to the plaintiff's own testimony he saw Mr. Kersey, the defendant's agent, and stated that he wanted to negotiate with reference to cattle space on the defendant's steamships; that he knew that that space was then controlled by the firm of Schwarzschild & Sulzberger; that Kersey stated that he must first see if that firm wanted to take the space and if they did not want it he would be glad to negotiate with the plaintiff. The plaintiff saw Mr. Kersey again a few days afterwards when Kersey said he was prepared to negotiate for the space. Thereupon certain matters were discussed between Kersey and the plaintiff, Kersey saying that he had six or seven vessels running, making weekly service, the number of which the plaintiff would not swear to, but the plaintiff said he wanted all the boats or none, to which Kersey responded that would be all right. The plaintiff says that "We discussed the particulars; he told me that their usual custom now was to insure their cattle; I asked him for how much, and he said \$75 per head. I told him that that was quite satisfactory; he said that that rate would include the insurance; he said that the demurrage would be 80 pounds, *the usual form of contract to be used*; he asked if *Williams' contract* was to be used, and I said no, *that of my own brokers*, 80 pounds per day, if they delayed our cattle, if their boat was not ready for our cattle when we were ready to deliver, we were to receive from them 50 cents per head per day for the detention of our cattle; and he further stated that they would not pay any brokerage, and that was the only thing that there was a hitch on at all; but we hadn't agreed on any rate; then I went back to the hotel, and I told Mr. Kersey that I was going to Chicago."

Thus far, it appears from the plaintiff's own testimony that no contract was agreed on. Some terms were discussed, but neither party was bound by that discussion, and it is obvious that neither intended to be bound by it and that a writing would be required to make a binding obligation. Nothing was agreed upon as to the actual maximum or minimum numbers of cattle to be shipped, or as to shipments by the passenger steamer *Cymric*, or as to dead

freight. But the plaintiff's contention is that a binding contract was made by a telegraphic correspondence which ensued between the plaintiff and Kersey. That correspondence is as follows :

"NEW YORK, Oct. 25th, 1897.

"W. W. BRAUER,

"Auditorium Annex, Chicago :

"Am ready to close all White Star steamers *carrying cattle* December first, 1897, to November 30th, 1898, inclusive 42/6 insured. Maximum numbers our call subject to your giving satisfactory guarantee, Liverpool, November 15th, but decline positively pay demurrage subject to reply by noon to-morrow, Tuesday.

"H. MAITLAND KERSEY."

"Dated CHICAGO, ILL., Oct. 26.

"To H. MAITLAND KERSEY,

"White Star Line, Broadway :

"Accept your proposition, confirm closing your boats for one year.

"BRAUER."

"Dated NEW YORK, Oct. 26.

"To W. W. BRAUER,

"Aud. Annex :

"Message received. Consider space closed.

"H. MAITLAND KERSEY."

"Dated CHICAGO, ILLS., 27.

"To H. MAITLAND KERSEY,

"White Star Line, New York :

"Leaving to-morrow for York via Baltimore, will call for contract Saturday morning, probably sailing *Lucania*.

"(Signed) BRAUER."

This telegraphic correspondence does not constitute a final contract between the parties. Kersey informed the plaintiff by the telegram dated October twenty-fifth that he was ready to close a contract for the White Star steamers *carrying cattle* at a price of forty-two shillings and six pence, with the right to the defendant to fix the maximum number of cattle to be carried. Brauer's answer is an acceptance of the proposition, and, so far as the price and the other matters referred to in Kersey's telegram are concerned, there

was an acceptance of those particular terms. Kersey's dispatch of October twenty-sixth undoubtedly shows his understanding that Brauer had agreed to take the space at a certain price, with the maximum numbers to be fixed by the defendant, subject to a satisfactory guaranty being given by the plaintiff and without liability to the defendant to pay brokerage, but that was not all of the contract contemplated by the parties. Notwithstanding that telegram, the matter was still *in fieri*. Both parties contemplated that the whole contract between them should be finally reduced to writing as the evidence of its terms, and that is shown by the last of the series of telegrams above quoted which Brauer sent from Chicago to Kersey, in which he states that he would call upon Kersey for the contract.

We cannot read into these telegrams all the detail referred to by the plaintiff as having been matters of discussion with Kersey before the plaintiff went to Chicago, and it is quite plain, from the action of the plaintiff on his return from that city, that he understood that a final binding contract had not been made, and that the telegrams related only to those terms which were specifically mentioned in the first telegram sent by Kersey to the plaintiff at Chicago. According to the plaintiff's own testimony, a written contract was to be executed, *not Williams' contract*, as he said, but his own brokers' contract, and when, on his return from Chicago, he applied to Kersey for a contract the subject of all the terms was yet unsettled. While the plaintiff says that he insisted upon the contract made by the telegrams, it is simply impossible to believe that he ever supposed that a contract of such a character, with so much detail, with so many matters to be covered fixing rights and obligations and liabilities, was simply to be left in the air, the four telegrams constituting a complete contract, while all the other matters of detail talked over in antecedent negotiations were to rest merely in an oral agreement. Unquestionably, it is a rule of law that a stipulation to reduce a valid contract to some other form does not affect its validity, and if the contract is in any form the stipulation may not be used by either of the parties for the purpose of imposing upon the other different obligations, or of evading the performance of any of the provisions of the contract, and, as was held in *Sanders v. P. B. F. Co.* (144 N. Y. 209), the rule applies

where, by means of letters and telegrams exchanged between parties, a definite proposition containing all the requirements of a completed contract is made by one and accepted by the other, with the understanding that the agreement will be expressed in a formal writing. To the same effect is *Stilwell v. Ocean Steamship Co.* (5 App. Div. 212); *Wilbur v. Collin* (4 id. 419); *Crossett v. Carleton* (23 id. 366); *Canda v. Wick* (100 N. Y. 127). Those were cases in which the whole contract with all its material terms could be spelled out from telegrams, correspondence or writings, or, as in *Pratt v. Hudson River R. R. Co.* (21 N. Y. 307), from an advertisement for bids and proposals made in writing pursuant to that advertisement. In the present case, a great mass of material detail would remain only in the memories of the negotiating parties, and all the terms were not settled.

The case is, therefore, one in which the feature is presented of negotiations for an agreement, some of the terms of which are agreed upon, but others of which still remain unsettled. Those agreed upon are partly in writing and partly oral, but both parties intended that the whole agreement, both as to the settled terms and those not yet agreed upon, should be compacted and put together in one writing which should be executed and delivered before it became obligatory upon either.

That consideration, we think, takes this out of the rule laid down in the cases above cited. We do not intend to decide that an oral agreement, complete and distinct in all its terms, and not affected by the Statute of Frauds, which the parties anticipate shall be reduced to writing, is not enforceable merely because of the omission of the formality of reducing it to writing. But that is not this case.

We think the action of the trial judge in setting aside the verdict was right.

The appeal from the order denying motion for nonsuit is dismissed, with costs, and the order setting aside the verdict is affirmed, with costs.

VAN BRUNT, P. J., O'BRIEN and McLAUGHLIN, JJ., concurred ;  
LAUGHLIN, J., dissented.

Appeal from order denying motion for nonsuit dismissed, with costs, and order setting aside verdict affirmed, with costs.

HENRY G. GABAY, Respondent, v. JOHN EDWIN DOANE and Others,  
as Executors, etc., of JOHN W. DOANE, Deceased, Appellants.

*Occurrences since an action was begun may be set up as a partial defense in mitigation of damages—such defense is not limited to actions to recover damages for breach of promise to marry, or for personal injury or injury to property.*

Where a vendor of real estate brings an action against his vendee to recover damages resulting from the action of the vendee in delivering to him, in part payment of the purchase price, a note and mortgage purporting to be signed by John Robinson and Edward F. Riley, but which had not, in fact, been signed by Riley, the vendee may, under section 508 of the Code of Civil Procedure, set forth in his answer, as a partial defense and in mitigation of damages, occurrences which took place after the action was begun and which had the effect of validating the note and mortgage and of making them enforceable securities.

Section 508, relative to the pleading of partial defenses, does not limit the right to interpose such defenses to actions to recover damages for a breach of promise to marry or for a personal injury or an injury to property.

APPEAL by the defendants, John Edwin Doane and others, as executors, etc., of John W. Doane, deceased, from an interlocutory judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 30th day of June, 1902, upon the decision of the court, rendered after a trial at the New York Special Term, sustaining the plaintiff's demurrer to the second defense contained in the answer.

*Edward S. Clinch*, for the appellants.

*J. Culbert Palmer*, for the respondent.

PATTERSON, J. :

This action was brought to recover damages alleged to have been sustained by the plaintiff in a transaction had between him and the defendants' testator, John W. Doane. The appeal is from an interlocutory judgment sustaining a demurrer to certain matter set up in the amended answer of the defendants, which is stated to be a partial defense to the cause of action set forth in the complaint, and which is substantially a recital of facts tending to reduce the damages claimed by the plaintiff. It is stated in the complaint that in March, 1900, the plaintiff sold to John W. Doane real estate in the city of New York known as Nos. 143, 145 and 147 Franklin street, in the

borough of Manhattan; that, as part of the consideration for the transfer, Doane indorsed and delivered to the plaintiff a certain promissory note for \$75,000, with interest at five per cent, and which purported on its face to be made by John Robinson and Edward F. Riley to the order of John W. Doane; that simultaneously with the delivery of the promissory note Doane also assigned to the plaintiff a mortgage which Doane represented to the plaintiff had been executed by Robinson and Riley and to have been given by them to secure the payment of the note, and it is charged that John W. Doane represented to the plaintiff that the mortgage was a first lien on real estate in the city of Chicago, in the State of Illinois, the mortgage also purporting on its face to have been executed by Robinson and Riley. It is further charged in the complaint that the defendants' testator also represented that, at the time of the execution of the note and of the mortgage, Robinson and Riley were the owners of the Chicago property, and that the note and mortgage accepted by the plaintiff in part payment for the transfer of the Franklin street property were spurious and void, and were never signed by Riley nor any one else having his authority; that at the time of the conveyance of the Franklin street property and the acceptance of the note and mortgage in part payment, the plaintiff had no knowledge that either the note or the mortgage was spurious, but that they were accepted in good faith, the plaintiff relying upon the assignment and indorsement and representations of the defendants' testator as to the genuineness of the instruments, and that the plaintiff has never ratified or confirmed his acceptance of them. It is not alleged in the complaint that John W. Doane knew that the note and mortgage were not signed by Riley, or that he intended to deceive or defraud the plaintiff.

This complaint has been construed by this court (*Gabay v. Doane*, 66 App. Div. 511), and it was held that the cause of action is to recover for the breach of an express or implied warranty of the genuineness of the note and mortgage, and that there are no allegations in the complaint that would justify an action in tort or by which the plaintiff's right to relief can depend upon false or fraudulent representations. To the complaint the defendants interposed an answer in which they set up certain occurrences that took place after the action was begun and which had the effect of validat-

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ing the note and mortgage and making them enforceable securities. That matter was pleaded as an entire defense to the action. The plaintiff demurred to that defense, and it was held by this court (*Gabay v. Doane, supra*) that the matter so pleaded was unavailable as a complete defense; that the plaintiff was entitled to recover such damages as he had sustained at the commencement of the action; that the subsequent acts of the defendants or makers of the note or of the owner of the property covered by the mortgage which would tend to validate the note and mortgage after the commencement of the action "could have no relation to the damages that the plaintiff had sustained when the action was commenced."

This language must be understood as relating to the matter pleaded constituting a complete defense, and that is obvious from an expression contained in another part of the opinion of the court, namely, "These allegations are made as a defense to the plaintiff's cause of action, not in mitigation of damages, or for the purpose of reducing the plaintiff's damage." All that was decided by this court in sustaining the demurrer on the former appeal was that matter which arose subsequent to the commencement of the action did not, in the form in which it was pleaded, constitute a defense going to the whole right of the plaintiff to recover. In sustaining the demurrer to the matter pleaded as an entire defense, permission was given to the defendants to answer over, and, in availing themselves of that permission, they have in an amended answer set up precisely the same matter contained in the original answer, but now present it as a partial defense and in reduction of damages. A demurrer has again been interposed and sustained by the Special Term. The learned justice by whom the argument of the present demurrer was heard conceived that this court having declared that the matter demurred to had "no relation to the damages that the plaintiff had sustained when the action was commenced," such matter was not available in an answer for any purpose. The phrase quoted from the opinion of the court in a certain way may be misleading, but it was not intended to prejudge the question of that matter constituting a partial defense.

It was unnecessary to discuss or determine upon the former appeal to what extent the same facts might have been pleaded in mitigation. If a plaintiff is entitled to recover not only the dam-



ages sustained by him to the time an action is commenced but also such additional damage as may have been caused by the acts complained of down to the date of trial, it is proper that a defendant be permitted to prove in mitigation facts arising after the commencement of the action.

What is now set up as a partial defense is pleaded in diminution of the amount which the plaintiff may recover and it is authorized by the provisions of the Code of Civil Procedure. Section 507 of that Code provides that a defendant may set forth in his answer as many defenses or counterclaims, or both, as he has, whether they are such as were formerly denominated legal or equitable. Section 508 provides that a partial defense may be set forth as prescribed in the last section, but it must be expressly stated to be a partial defense to the entire complaint, or to one or more separate causes of action therein set forth. Upon a demurrer thereto, the question is whether it is sufficient for that purpose. In the same section (508) it is further provided that matter tending only to mitigate or reduce damages in an action to recover damages for the breach of a promise to marry or for a personal injury or an injury to property, is a partial defense within the meaning of this section.

The argument of the respondent seems to be that the provision last quoted of section 508 makes an exclusive classification of partial defenses, and therefrom is drawn the inference that there can only be a partial defense to an action to recover damages for a breach of a promise to marry or for a personal injury or an injury to property; but that is clearly an erroneous inference. In *McKyring v. Bull* (16 N. Y. 303), in giving construction to section 149 of the Code of Procedure, which is identical with section 500 of the Code of Civil Procedure, the Court of Appeals held that it should be so interpreted as to require defendants *in all cases* to plead any new matter constituting either an entire or partial defense and to prohibit them from giving such matter in evidence upon the assessment of damages when not set up in the answer, and SELDEN, J., said: "Not only payment, therefore, in whole or in part, but release, accord and satisfaction, arbitrament, &c., which may still, for aught I see, be made available in England in mitigation of damages without plea, *must here be pleaded.*" That case is still authority.

It is argued that the matter constituting the partial defense arose subsequent to the commencement of the action and that, in legal actions, differing in that respect from suits in equity, the rights of the parties must be determined as of the time of the commencement of the action. As was remarked by PRYOR, J., in *Ferris v. Tannebaum* (39 N. Y. St. Repr. 72): "But, in an action of a legal nature, the right of the parties must be determined as they existed at the commencement of the action, except so far as the situation has been since changed unfavorably to the plaintiff's claim, either by his own act or by operation of the law, the reason being that in a legal action the statute gives costs, and as they ought not to be charged on a plaintiff who had good ground to sue, *the defendant should get leave to plead*, so that the court may impose terms. (26 Abb. N. C. 22, 24; *Wisner v. Ocumpaugh*, 71 N. Y. 113; *Styles v. Fuller*, 101 id. 622.)"

In considering this demurrer, we can only pass upon the sufficiency of the matter pleaded as constituting a partial defense. We cannot assume that leave to plead was not given.

The interlocutory judgment sustaining the demurrer should be reversed, with costs, and the demurrer overruled, with costs, with leave to withdraw demurrer on payment of costs in this court and in the court below.

VAN BRUNT, P. J., O'BRIEN, McLAUGHLIN and LAUGHLIN, JJ., concurred.

Judgment reversed, with costs, and demurrer overruled, with costs, with leave to withdraw demurrer on payment of costs in this court and in the court below.

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THE CITY OF NEW YORK, Respondent, v. GEORGE G. REESING and FREDERICK PITNEY, Copartners, doing Business under the Firm Name and Style of REESING & PITNEY, Appellants.

*Cabs standing in front of hotels (not at hack stands) in the city of New York must pay a license fee of twenty-five dollars in addition to the three dollars license fee.*

Livery stable keepers, doing business in the city of New York, who make an agreement with the proprietor of a hotel in that city to supply carriages or cabs to that hotel and who, with the written consent of such proprietor, but

without the consent of the city, keep a number of cabs standing in front of the hotel awaiting passengers, must, in addition to the license fee of three dollars imposed on special hacks by sections 456 and 457 of the revised ordinances of the city of New York, pay for each of such cabs the additional fee of twenty-five dollars, imposed pursuant to sections 19 and 18 of the ordinance approved May 22, 1899, upon hacks using, with the written consent of the owner or leasee of the abutting premises, a public street as a private hack stand.

The enactment of the ordinance of May 22, 1899, was within the power of the municipal legislature.

APPEAL, by permission, by the defendants, George G. Reesing and another, copartners, doing business under the firm name and style of Reesing & Pitney, from an order of the Appellate Term of the Supreme Court, entered in the office of the clerk of the county of New York on the 29th day of May, 1902, affirming a judgment of the Municipal Court of the city of New York, borough of Manhattan, third district, in favor of the plaintiff, and also (as stated in the notice of appeal) from a judgment of the Appellate Term of the Supreme Court, entered in the office of the clerk of the county of New York on the 29th day of May, 1902, upon said order of affirmance.

*William J. Fanning*, for the appellants.

*Henry Clark Johnson*, for the respondent.

PATTERSON, J.:

The question upon which this case turns is a very narrow one, and relates only to the liability of the defendants to pay a fine by reason of their violation of a city ordinance. They are livery stable keepers, and own and use in their business carriages and cabs which are hired for public use. They made an agreement with the proprietor of the Hotel Imperial in the city of New York to supply carriages or cabs to that hotel and to pay the proprietor thereof ten per cent of the gross receipts. With the written consent of that proprietor, they keep from six to eight cabs standing in front of his premises awaiting passengers from the hotel. They have paid a license fee of three dollars each for twenty-five cabs, including those which stand in front of the Hotel Imperial, that being the license fee chargeable upon what are called special hacks or cabs. While the defendants have the permission of the proprietor of the hotel to

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stand in front of his premises and he shares in profits with them, they have not the permission of the city to use the street in front of the hotel as a cab stand.

It has been sought on this appeal to have this court pass upon the right of a hotel proprietor to maintain a cab service in the street in front of his premises, but that question is not involved in this appeal, and its determination is not necessary to the ascertainment of the defendants' liability to pay the fine which has been imposed upon them. The city contends that the defendants have no right to use the street in front of the hotel as a cab stand unless they pay a license fee of twenty-five dollars for each cab and receive a permit. By section 453 of the revised ordinances of 1897 of the city of New York, which is still in force, it is provided that the owner or driver of any hackney coach or cab which shall stand waiting for employment at any other place "than as herein provided" shall be liable to a fine of ten dollars, to be imposed by the mayor or his first marshal, and to be sued for and recovered by the attorney for the corporation for the use of the city.

It is claimed by the plaintiff that the defendants, having no right to occupy the street in front of the Hotel Imperial with their cabs, except as stated, were liable to the fine mentioned in section 453, and such a fine was imposed by the chief of the bureau of licenses, the successor to the first marshal to the mayor. The fine not being paid, this action was brought on an agreed statement of facts, judgment was rendered in favor of the plaintiff in the Municipal Court, and on appeal to the Appellate Term of the Supreme Court was affirmed. By leave of the Appellate Term an appeal was taken by the defendants to this court.

The main subject of consideration is the right of the defendants to occupy, with their cabs, a part of the public street while waiting for employment, without paying a license fee of twenty-five dollars as is required by the provisions of the ordinances of the city of New York.

In the agreed statement of facts it appears that, under the municipal regulations, the hack system of New York city has for many years practically divided all cabs, carriages, coaches and such vehicles as are kept for hire into two classes, known and designated as public hacks and specially licensed or special hacks; that public

hacks are allowed to use only the designated *public hack stands* while waiting for employment; that specially licensed or special hacks do not use the designated public hack stands while waiting for hire, but stand in livery stables or in front of certain premises such as hotels, etc., by virtue of a special permit; and the class of special hacks is restricted to the carrying of passengers from the stables or premises in front of which they stand; that a special or private permit for certain specified stands is given by the executive department of the city government, but only with the consent of the owner or lessee of said premises. It is admitted in the statement of facts that the premises occupied by the Hotel Imperial "are not enumerated" as one of the regular designated places where public hacks may stand while waiting for employment, and further, that the defendants did not use nor intend to use any of the regular designated public hack stands of the city. Section 456 of the revised ordinances of 1897 of the city of New York provides that the proprietor of any hackney coach or carriage or cab who does not intend to come upon and use the public stands with such hackney coach or carriage or cab shall, at the time of applying for a license of the same, state in writing to the mayor such intention, and thereupon a special license may be granted in the discretion of the mayor. Section 457 provides that for every such special license granted by virtue of the article containing these sections there shall be paid for every coach or carriage five dollars, and for each cab three dollars.

The defendants' licenses for their cabs were granted under the terms of these two sections. Sections 456 and 457 relate merely to a license fee to be paid for a hackney coach, cab or carriage which it is not intended by the owner shall come upon or make use of the public stands. Those sections do not relate to a license fee to be paid by the proprietors of carriages or cabs that use the public streets as standing places while waiting for employment. It is provided in section 12 of the ordinance approved May 22, 1899, that the owner of any hack not intending to use the public stands and having the written consent of the owner or lessee of the premises, in the discretion of the mayor or the chief of the bureau of licenses, may be specially licensed and permitted to use temporarily a portion of the street in front of such premises as a stand, and shall be confined to carrying passengers from said premises. Section 13 of

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that ordinance provides that the owner of hacks specially licensed shall, in addition to the lawful fees hereinbefore provided, pay annually an additional fee of twenty-five dollars for each hack allowed any stand other than a public hack stand, and no other than a licensed hackman shall come upon or use the said stand. These sections of the ordinance not only relate to the payment of a license fee but to the regulation of the streets, and were passed conformably to authority contained in sections 50 and 51 of the Greater New York charter which gives to the municipal legislature of the city the power to regulate the use of the streets and sidewalks by foot passengers, animals or vehicles and to provide for the licensing and otherwise regulating the business of hackmen and cabmen, etc. The charge of twenty-five dollars for the privilege conferred by sections 12 and 13 of the ordinance of 1899 is in addition to the lawful fees for the special license.

If the cab proprietor desires to use his vehicles without going upon the public stands, he must pay a license fee of three dollars. If he wishes to avail himself of the privilege of using the streets as a private stand under the permission and provisions of sections 12 and 13 of the ordinance of 1899, for that additional right and privilege he is required to pay a fee of twenty-five dollars for each hack allowed so to stand. That does not convert the private hack stand into a public hack stand. As is well remarked by the counsel for the city, all that the ordinance does or attempts to do is to provide separate stands where each of two classes of licensed hacks may stand and to forbid each to use the stand provided for the other.

We see nothing in the requirement that the additional license fee of twenty-five dollars shall be paid for the privilege of a private stand, beyond the authority of the municipal legislature to enact. The right and the power of the city to pass such ordinances cannot be questioned. A case is not presented of an ordinance authorizing the establishment of a hack stand in front of private premises without the consent of the owner or the lessee. The privilege of using the private hack stand, according to section 12, can only be with the consent of the owner or lessee of the premises. But the consent of the owner to hacks standing in front of his premises does not exempt the hack proprietor from the payment of the license fee required by the ordinance.

It is admitted in the statement of facts that the defendant's cabs stand in front of the Hotel Imperial without the payment of the twenty-five dollars license fee, hence they stand there awaiting employment at a place at which they are not authorized to stand, without the payment of the license fee. So doing, the owner is brought within the provision of section 453 of the revised ordinances of the city of New York and is liable to the fine provided for in that section, there being no permit of the city given as required by the ordinance.

The determination of the Appellate Term should be affirmed, with costs.

VAN BRUNT, P. J., O'BRIEN, McLAUGHLIN and LAUGHLIN, JJ., concurred.

Determination of Appellate Term affirmed, with costs.

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JOHN B. B. FISKE, Appellant, v. MARINA ELENA PARKE, Formerly  
MARINA ELENA DELGADO, Respondent.

*Attachment — not leviable upon the equitable interest of a beneficiary in a trust — a bond and mortgage must be taken into the actual custody of the sheriff.*

The equitable interest of a beneficiary under a trust created by a will is not subject to a levy under an attachment, an attachment being leviable only upon legal interests.

The only way in which a bond and mortgage can be levied upon under an attachment is by the sheriff's taking the instruments into his actual custody.

The debt secured by the bond and mortgage cannot be levied upon as an existing obligation independent of the bond and mortgage.

APPEAL by the plaintiff, John B. B. Fiske, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 29th day of October, 1902, vacating a judgment theretofore entered against the defendant in this action, upon her failure to appear or answer, and also an *ex parte* order directing the entry of such judgment.

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*David F. Toumey and John B. B. Fiske*, for the appellant.

*Frederick J. Moses*, for the respondent.

PATTERSON, J. :

From an order vacating a judgment entered against the defendant, upon her failure to appear and answer in the action, this appeal is taken. The motion to vacate was granted at the Special Term, on the ground that the court never acquired jurisdiction over the defendant or her property. The summons was served upon the defendant without the State and by publication, and it was sought by the plaintiff to acquire jurisdiction by attachment. A warrant was procured, under which the sheriff of the county of New York and the sheriff of Kings county undertook to levy upon what is claimed to be property or property rights of the defendant. It would appear that in the effort to make a levy the sheriff of New York county served a warrant with notice upon E. W. Sells, trustee under the last will and testament of Ella A. Delgado, and such trustee delivered to the sheriff a certificate stating that the defendant was the beneficiary of a trust of one-half of an estate in his hands under such will, and that the income derived therefrom and payable to the defendant was not more than sufficient and necessary for the support of the said defendant.

The interest of the defendant as a *cestui que trust* was not the subject of attachment. She had no legal title or estate; her interest was purely equitable, the title was in the trustee and she could only enforce the trust in equity. An attachment is leviable only upon legal interests and does not extend to equitable interests. (*Thurber v. Blanck*, 50 N. Y. 80; *Anthony v. Wood*, 96 id. 180.)

The sheriff of Kings county undertook to make a levy by serving a certified copy of the warrant with notice on William A. Brown, on July 10, 1902. Brown, on September 26, 1902, delivered to the sheriff a certificate stating that he was indebted to the defendant in the sum of \$7,000, which was secured by a bond and mortgage on property in Kings county. It does not appear that anything further was contained in Brown's certificate, but in October, 1902, in an examination of Brown in aid of an execution issued upon the judgment, he testified that he then had in his hands \$175 interest which became due on the bond and mortgage on September 6, 1902,



or about two months after the warrant and notice were served upon him. No effectual levy was made upon the debt secured by the bond and mortgage. Under section 649 of the Code of Civil Procedure a levy under a warrant of attachment is required to be made upon personal property capable of manual delivery, including a bond, promissory note or other instrument for the payment of money, by taking the same into the actual custody of the sheriff. A bond which is collaterally secured by a mortgage is not excluded from the operation of that section. At the time the copy of the warrant and the notice were served upon Brown, no interest apparently was due upon the mortgage, and, therefore, there was no accrued interest which would constitute a debt severed from the bond and mortgage. Nor could the debt secured by the bond and mortgage be levied upon as an existing obligation, irrespective of the bond and mortgage. (*Von Hesse v. Mackaye*, 55 Hun, 365.) The bond and mortgage could only be levied upon by the sheriff taking them into his actual custody. (*Anthony v. Wood*, *supra*.)

The order appealed from should be affirmed, with ten dollars costs and disbursements.

VAN BRUNT, P. J., O'BRIEN, McLAUGHLIN and LAUGHLIN, JJ., concurred.

\ Order affirmed, with ten dollars costs and disbursements.

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JACOB FINKELSTEIN, Respondent, v. ANNA G. HUNER, Appellant.

*The maintenance of a leaky water closet which damages adjoining property constitutes a private nuisance—when a request to abate it or proof of knowledge is unnecessary.*

Where a person who, as the executor of and trustee under a will, owns and is in possession of certain premises, maintains upon such premises a leaky water closet, in consequence of which large quantities of water leak through the wall of an adjoining house, damaging it and subjecting the owner and tenants thereof to great annoyance and discomfort, the defective water closet constitutes a private nuisance, and the owner of the adjoining premises is entitled to maintain an action in equity against the executor and trustee to restrain the further maintenance of such nuisance and to recover the damages sustained by him therefrom.

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In such an action it is not necessary for the plaintiff to prove a request to the defendant to abate the nuisance, nor, where it does not appear that the nuisance existed before the defendant became the owner of the premises, to show that the defendant had knowledge or notice of the existence of the nuisance before the action was brought.

O'BRIEN and LAUGHLIN, JJ., dissented.

APPEAL by the defendant, Anna G. Huner, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 24th day of June, 1902, upon the decision of the court, rendered after a trial at the New York Special Term, restraining the continuance of a nuisance upon the defendant's premises.

*James A. Gray*, for the appellant.

*Jacob Friedman*, for the respondent.

PATTERSON, J. :

The plaintiff is the owner of premises No. 43 Jefferson street in the borough of Manhattan, city of New York. The defendant, as she states in her answer, is, as executor of and trustee under the will of Frederick Huner, deceased, the legal owner and in possession of the building and premises known as No. 41 Jefferson street and adjoining the plaintiff's property. The plaintiff claimed and proved at the trial that the defendant maintained on her premises contiguous to the rear of the northerly wall of the plaintiff's house a water closet, the cesspool of which was broken, rotten and leaky; that by reason of the improper and defective condition of the cesspool, large quantities of water leaked, and at the time the action was brought continued to leak, through the wall of the plaintiff's building and into the basement thereof and made the wall "weak, rotten, unsafe and dangerous," so that it had to be taken down and another brick wall built, replastered and painted; that the floor of the basement of plaintiff's building had been considerably damaged, and that by reason thereof such basement became unfit for business purposes, depreciated in rental value and was for a long time vacant, and plaintiff lost and will lose considerable rent; and that foul smells have been and are emitted from the water closet, to the great annoyance and discomfort of the plaintiff and his tenants who reside in the building aforesaid. The action was brought for an

injunction to restrain the defendant from maintaining in its imperfect condition the cesspool upon her premises, and for damages for the injuries sustained by the plaintiff. The answer contains the admission of the defendant of the ownership above mentioned, denies upon information and belief plaintiff's ownership of his premises, and also denies all the allegations in the complaint respecting the alleged maintenance of the imperfect cesspool and privy upon her property, and alleges that the plaintiff has an adequate remedy at law.

On the trial the evidence adduced was sufficient to authorize the court to make the decision that was made—in substance, that the allegations of the complaint were true; that the defendant did maintain upon her property the privy and cesspool in such a defective condition that the water from the cesspool leaked through the plaintiff's wall and injured it and flowed into his premises, with the consequences alleged in the complaint. In addition to those findings, the court upon evidence ascertained and fixed the amount of the damage which the plaintiff sustained by reason of the wrongful and negligent maintenance by the defendant of the privy and cesspool in its defective condition. Upon the decision of the court, a final judgment was entered restraining the defendant from continuing to maintain the appurtenance to her property mentioned in its defective condition, and awarding the plaintiff a small sum of money for his damages.

The action, both for an injunction and the recovery of damages, is supported by what was held in *Davis v. Niagara Falls Tower Co.* (171 N. Y. 336). The right to the recovery of damages based upon the negligence of the defendant in maintaining the privy and cesspool in its improper condition so that damage occurred to the plaintiff, is supported by *Holland House Co. v. Baird* (169 N. Y. 136); *Jutte v. Hughes* (67 id. 267); *Davis v. Niagara Falls Tower Co.* (*supra*). The existence of the defective appurtenance to the defendant's premises, under the circumstances disclosed in this record, amounted to a private nuisance. It was not necessary to prove a request to the defendant to abate it. (*Conhocton Stone Road v. B., N. Y. & E. R. R. Co.*, 51 N. Y. 573.) The point of the defendant's having knowledge or notice of the existence of this nuisance before action brought is not involved in this case, for there

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is no evidence to show that the water closet and cesspool were a nuisance before the defendant became the owner of the premises. Notice is only necessary when the nuisance itself existed before the person sought to be charged with its continuance became the owner of the premises. (*Conhocton Stone Road v. B., N. Y. & E. R. R. Co., supra.*)

The judgment appealed from should be affirmed, with costs.

VAN BRUNT, P. J., and McLAUGHLIN, J., concurred; O'BRIEN and LAUGHLIN, JJ., dissented.

O'BRIEN, J. (dissenting):

It has been repeatedly held where injury is caused by water overflowing another's premises that a distinction is to be noted between cases where the defendant has constructed that which causes the damage and where he has come into possession of premises upon which it exists and thereafter maintains it. In other words, where one constructs the thing which does the injury, his knowledge of its existence will be imputed, but the same rule does not prevail with respect to one who merely uses what he receives as an appurtenance to the premises of which he enters into possession. In the latter case it is necessary either to prove knowledge of the existence of that which produces the injury or to prove notice, actual or constructive, before one can be charged with liability merely because he maintains it on his premises. (*Ahern v. Steele*, 115 N. Y. 203; *Conhocton Stone Road v. B., N. Y. & E. R. R. Co.*, 51 id. 573; *Schreiber v. Driving Club of New York*, 17 Misc. Rep. 131.) The case first cited (*Ahern v. Steele, supra*) fully states the law and therein the authorities on the subject were collated, and the court said: "The owner is responsible if he creates a nuisance and maintains it; if he creates a nuisance and then demises the land with the nuisance thereon although he is out of occupation; if the nuisance was erected on the land by a prior owner or by a stranger and he knowingly maintains it; if he has demised premises and covenanted to keep them in repair and omits to repair and thus they become a nuisance; if he demises premises to be used as a nuisance or for a business or in a way so that they will necessarily become a nuisance. In all such cases I believe there is now no dispute that the owner would be liable. \* \* \* A

grantee or devisee of premises upon which there is a nuisance at the time the title passes is not responsible for the nuisance until he has had notice thereof and in some cases until he has been requested to abate the same. The authorities to this effect are so numerous and uniform that the rule which they establish ought no longer to be open to question." And in *Conhocton Stone Road v. B., N. Y. & E. R. R. Co.* (*supra*) it was held, as said in the head note, that "In order to maintain an action for damages resulting from a nuisance upon defendant's land, where such nuisance was erected by a previous owner before conveyance to defendant, it is necessary to show that before the commencement of the action he had notice or knowledge of the existence of the nuisance."

The rule which has been formulated by the majority of the court may be more salutary and more just, but I do not feel at liberty, in view of the number of cases in which a different rule has been held, to divert from what I regard as the settled law. In recognition, therefore, of the principle of *stare decisis*, I dissent, and think that the judgment appealed from should be reversed and a new trial granted.

LAUGHLIN, J., concurred.

Judgment affirmed, with costs.

77 428 | THE PEOPLE OF THE STATE OF NEW YORK ex rel. ISAAC J. GREEN-  
81 124 | wood, Executor and Trustee of the Estate of ISAAC J. GREENWOOD,  
Deceased, Respondent, v. THOMAS L. FEITNER and Others, Com-  
missioners of Taxes and Assessments of the City of New York,  
Appellants.

*Assessment of real property in New York city—a review thereof rests upon the application made to the assessors—what does not establish an overvaluation—what is not a statement that the property is assessed for more than the sum for which it would sell—unrented space, not considered.*

An owner of property located on Fulton street in the city of New York which had been assessed for the year 1901 at the sum of \$125,000, presented an application pursuant to section 895 of the Greater New York charter (Laws of 1897, chap. 878) for a reduction of the assessment. The application alleged that in the year 1898 the premises rented for \$28,865, and that in 1899 and 1900 the

rents fell to \$19,266, and that the value of the unrented space exceeded \$1,000; that assuming the real value of the property to be \$125,000 the average net income thereof was one and three-tenths per cent of such value; that in 1899 the assessed valuation of the premises was \$90,000; that in 1900 it was \$108,000. The application further stated that the assessment was unjust and unreasonable; that the value of the property in Fulton street had declined for several years and requested that the assessment be reduced to the sum of \$75,000, which the applicant stated was a fair and reasonable valuation of the premises. The tax commissioners having denied the application, the property owner sued out a writ of certiorari to review their action. The petition for the writ set out the application in full, and submitted, in addition thereto, a table setting forth the assessed value of several pieces of property in the vicinity and claimed that a comparison of such property with the property of the relator would show that the assessment was disproportionate and unequal. Such table did not disclose the market value of the relator's property nor that of the properties with which it was sought to be compared.

*Held*, that the relator must stand or fall in the certiorari proceedings upon the case made by him in the application to the tax commissioners;

That neither the application nor the petition for the writ of certiorari established a case of overvaluation;

That the statement in the application that \$75,000 was "a fair and reasonable valuation" of the premises was not an allegation that the premises were assessed for a sum greater than that for which the property would sell under ordinary circumstances;

That in determining the assessed value of the premises the unrented space could not be taken into consideration.

LAUGHLIN, J., dissented.

APPEAL by the defendants, Thomas L. Feitner and others, commissioners of taxes and assessments of the city of New York, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 10th day of September, 1902, denying the defendants' motion to quash a writ of certiorari theretofore issued to review an assessment for taxation and granting the relator's motion for a reference.

*David Rumsey*, for the appellants.

*Joseph M. Proskauer*, for the respondent.

HATCH, J. :

The relator's testator was the owner of certain real estate known as Nos. 102 and 104 Fulton street, in the city of New York. In the year 1901 the commissioners of taxes and assessments assessed

the premises on the assessment roll at \$125,000. The relator made an application to the defendants for a reduction of the same. In this application he showed that in the year 1898 the premises rented for \$23,365, and in 1899 and 1900 it had fallen to \$19,266, and that the value of the unrented space exceeded \$1,000; that the total disbursements for taxes, fixed charges and necessary operating expenses during the said three years averaged \$17,803.33, leaving an annual net income of \$1,699.67, which income was greater in the year 1898 and less in the year 1900; that, assuming the real value of the property to be \$125,000, as assessed in 1901, the average net income would be one and three-tenths per cent of such valuation; that in 1899 the assessed valuation of the premises was \$90,000; that in 1900 it was \$108,000, and in 1901 \$125,000; that in 1898 the taxes amounted to \$1,876.55, in 1899 to \$2,210.80, and in 1900 to \$2,427.50. The application further states that this is unjust and unreasonable; that the value of property in Fulton street had declined for several years, and requests that the assessment be reduced to the sum of \$75,000, which is a fair and reasonable value of the premises.

Upon this application the defendants caused the property to be re-examined by the deputy who made the first examination, and he reported that the assessed valuation of the property is "equal and in proportion to similar property in the said First Tax District." And thereupon the defendants denied the application and confirmed the assessment. The relator then sued out a writ of certiorari to review this ruling of the commissioners. The petition for the writ set out the application in full and submitted in addition thereto a table setting forth the assessed value of several pieces of property in the vicinity of the property in question and claimed that a comparison of the properties therein mentioned with the property of the relator would show that the assessment was disproportionate and unequal. In the table submitted in the petition the market value of the properties is not disclosed, nor is the market value of the relator's property stated. The relator subsequently moved for a reference and for leave to amend the petition, and the defendants moved at the same time to quash the writ. The motion for a reference was granted and the referee was directed to allow numerous amendments to the petition, including an amendment setting forth the claim of over-

valuation. From the whole of the order thus made the defendants appeal.

Pursuant to the provisions of section 895 of the charter (Laws of 1897, chap. 378) the application for a reduction of the assessed valuation is required to be in writing and must state the grounds of objection thereto. The application is the matter which sets the assessors in motion in review of the assessment, and the case made by it must show that the relator is entitled to relief; he must stand or fall upon the grounds of error averred therein and is limited in review of the same by writ of certiorari to the case which he then makes. (*Matter of McLean*, 138 N. Y. 158.) If other objections in fact existed at the time when the application was made, but are not stated therein, they are not available upon a review. In the case last cited it was held that the relator would be precluded from urging that the assessors had no jurisdiction to levy the tax unless such point was taken in the application. It is evident, therefore, that the court was without authority to consider matters averred in the petition or other papers of the relator which were not embodied in the application presented to the commissioners. So limited, it is clear that there was no basis from which an overvaluation of the property appeared, as there is nothing contained in the application showing the market value of the property assessed or that it was higher than other property similarly situated. This ground must be made distinctly to appear before the commissioners are authorized to act upon the application, and the claim must be distinctly made. (*People ex rel. Broadway Improvement Co. v. Barker*, 14 App. Div. 412.) The relator, therefore, failed to make out a case showing any ground for relief based upon overvaluation in the application which he made; and amendments to his petition cannot enlarge the case contained in the application.

If we consider the petition as amended, the same result follows. The only addition in this respect which is made thereto is a schedule of assessed valuations upon a number of pieces of property. The only averment in connection therewith is, that a comparison of the premises owned by the relator with the others contained in the table shows that the value assessed thereon is much greater than that assessed upon any other property similarly situated, and in market value is entirely disproportionate and unequal. There is



nothing showing the market value of the particular pieces of property so scheduled, or the market value of the relator's property; consequently, there is no basis, even under the petition, for any relief, and, therefore, there is nothing to show that the relator will pay more than his due share of the aggregate tax. (*People ex rel. Warren v. Carter*, 109 N. Y. 576.)

The relator must, therefore, rest upon his right to review by showing that his property has been overvalued. The proof bearing upon this statement relates to the depreciation in rental value of the property, the whole of which we have heretofore set out. In *People ex rel. Sutphen v. Feitner* (45 App. Div. 542) it was held that it was incumbent upon the relator to show, in order to establish overvaluation, that his property was assessed at a greater sum than that for which under ordinary circumstances it would sell. In that case it was stated "that the market value of the property had not increased since 1895, and that the ability to sell the property had, in fact, decreased; and then were stated the sums at which the property was assessed in 1895 and 1896;" there was nothing to show that in these years it was assessed at its true market value. This averment was held insufficient to establish a case of overvaluation. In the present case there is an entire absence of averment that the assessment is greater than the fair market value of the property, or for a sum greater than that for which the property would sell under ordinary circumstances. The statement is that \$75,000 "is a fair and reasonable valuation of these premises, as aforesaid." Clearly, this is insufficient. The rule announced in the *Sutphen Case* (*supra*), which is controlling of this appeal, was adopted in *People ex rel. Zollikoffer v. Feitner* (63 App. Div. 615). The latter case was affirmed on appeal (168 N. Y. 674).

In addition to this, it appears in the statement that the "unrented space in the premises exceeded one thousand dollars." How much it exceeded this sum is not made to appear. The relator would not be entitled to escape taxation upon the fair value of his property, even though it were vacant and produced no income. The unrented space cannot be deducted in arriving at its assessed valuation; and from all that appears, it may be that if the whole were rented, the income therefrom, based upon rental values, would show that the assessed valuation was proper.

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It is clear, therefore, that the relator failed to make a case in his application which entitled him to a reduction of the assessment, and the motion to quash the writ should have been granted. The order should, therefore, be reversed and the writ of certiorari quashed, with fifty dollars costs and disbursements.

VAN BRUNT, P. J., PATTERSON and INGRAHAM, JJ., concurred;  
LAUGHLIN, J., dissented.

Order reversed and writ of certiorari quashed, with fifty dollars costs and disbursements.

In the Matter of the Application of THE CITY OF NEW YORK, Appel-	77	483
lant, Relative to Acquiring Title, Wherever the Same has not	78	1 89
Been Heretofore Acquired, to the Public Park (Although not	78	497
yet Named by Proper Authority) Lying Between Spuyten	77	433
Duyvil Road and the New York Central and Hudson River	80	1288
Railroad, Extending from a Point Opposite Johnson Avenue to		
about 650 feet in a Southerly Direction, in the Twenty-fourth		
Ward, Borough of The Bronx of the City of New York.		

JOHN J. QUINLAN and Others, Commissioners of Estimate and  
Assessment, Respondents.

*Fees of commissioners of estimate and assessment in the city of New York — what proof as to the number of days consumed must be furnished — charges for meetings at which nothing is done.*

Section 998 of the Greater New York charter (Laws of 1897, chap. 878, as amended by Laws of 1901, chap. 466), relative to the taxation of the costs, fees and expenses of the commissioners of estimate and assessment appointed in a condemnation proceeding instituted by the city of New York, contemplates that the commissioners shall submit proofs from which the court may be able to see that the number of days charged for by the commissioners were necessarily devoted to the proceeding.

Affidavits made by each of the commissioners, stating, in general terms, that they had performed and discharged all of their duties as such commissioners, and had been employed a specified number of days and would be engaged two more days in making a final report, which affidavits are supplemented by an affidavit made by an employee of the corporation counsel having charge of the

books and accounts of the proceeding, who deposes that the expenses of the proceeding, other than the charges of the commissioners, are a certain sum and that the bill of costs of the commissioners is in all particulars correct, do not constitute such proof of the justice of the charges as the section requires.

The commissioners appointed in such a proceeding are not entitled to charge fees for attending meetings at which nothing is done or which are unnecessarily adjourned, even though the failure to do anything and the unnecessary adjournments are due to the action of the corporation counsel.

**APPEAL** by the petitioner, The City of New York, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 11th day of July, 1902, taxing the costs, charges and expenses of the commissioners of estimate and assessment appointed in the above-entitled proceeding.

*John P. Dunn*, for the appellant.

*Charles Strauss*, for the respondents.

**HATCH, J. :**

The respondents were appointed in a proceeding upon the part of the city to acquire title to a public park lying between Spuyten Duyvil road and the New York Central railroad. The proceeding involved an assessment of damages upon nine parcels of land, in area less than six and three-quarter city lots. By section 998 of the Greater New York charter (Laws of 1897, chap. 378, as amd. by Laws of 1901, chap. 466) it is provided that the costs, fees and expenses in such a proceeding, required by law to be taxed, shall be stated in detail in the bill of costs, and shall be accompanied by such proof of the reasonableness and necessity thereof as is now required by law and the practice of the Supreme Court upon taxation of the costs and disbursements in other special proceedings. No unnecessary costs or charges shall be allowed. Section 999, as thus amended, imposes the duty upon the corporation counsel to present to the justice taxing the costs his certificate, in writing, that the items of costs, charges and expenses have been audited and examined by him, and also setting forth the result of such audit and examination.

The commissioners upon their application for an assessment of

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their fees, presented an affidavit, which stated in general terms that they had performed and discharged all of their duties as such commissioners, and had been employed a specified number of days and would be engaged two more days in making a final report. Each commissioner made such an affidavit. In addition thereto, Michael J. Morrison, an employee of the corporation counsel in the bureau of street openings, and who had charge of the books and accounts thereof, deposes that the expenses of the proceeding, other than the charges of the commissioners, were \$1,155.07. As to the bill of costs of the commissioners of estimate and assessment, he states that it is in all particulars correct. This was the only proof upon which the commissioners moved for an assessment of their costs and fees. It is evident that the statement of the commissioners is not such a detailed statement as is contemplated by section 998 of the charter. What was done upon the number of days stated to have been occupied by each commissioner is not set forth, nor is there anything either in the affidavits or in the certificate of the employee having charge of the books in this proceeding, which shows in detail that the number of days for which fees are asked were necessary in the performance of the duties imposed upon the commissioners. The proof in this respect should be something more than a statement in general terms, giving the number of days. The court is the taxing officer, and it should be able to see from the proofs submitted that the number of days were necessarily devoted to the proceeding. The application, therefore, might well have been denied for insufficiency of proof upon which to base the taxation. The certificate and audit by the corporation counsel, as required by the charter, reduces the fees of the commissioners in a considerable amount, and in connection with such certificate is set out a classification of the services rendered by the commissioners and the number of days in which they were actually employed in connection with each particular service. An examination of the record kept by the commissioners, which accompanied the certificate of the corporation counsel, and the classification made by him seem clearly to show that the fees claimed by the commissioners and allowed by the court are excessive. Nor do the affidavits submitted in opposition to the certificate of the corporation counsel change this conclusion. The affidavit of Quinlan, which is adopted by the

other commissioners, does not specify in detail what was done at the particular sessions which have been criticised as unnecessary. While many words are used it amounts only to a general statement that something was done at these times, and that if nothing was done, or if adjournments were had unnecessarily, it was due to the action of the corporation counsel's office. The commissioners, however, may not shelter themselves behind any dereliction of duty upon the part of the corporation counsel which occasioned the prolongation of these proceedings beyond what was necessary; for no matter how the delays were occasioned, if nothing was done upon those days which authorized the commissioners to charge, or the adjournments were unnecessary, it would not entitle the commissioners to fees, no matter who was responsible therefor.

Making due allowance for the explanation which is made in the last affidavits, and fairly allowing for all the items therein claimed, it does not seem to entitle the commissioners to the fees which have been awarded. In the corporation counsel's certificate the commissioners are allowed for a certain number of days at the rate of six dollars per diem, and a certain number of days at ten dollars per diem. This is due to the fact that between the time when the commissioners entered upon the discharge of their duties and the date of their completion a change was made in the law increasing the compensation from six to ten dollars per diem. (Laws of 1897, chap. 378, § 998, as amd. by Laws of 1901, chap. 466.) Upon the application to tax, the court denied the claim of the commissioners to a compensation of ten dollars per diem and allowed them compensation at six dollars per diem for the meetings held prior to January 1, 1902, at which they claim to have been necessarily employed. No appeal was taken by the commissioners from the order, and, therefore, they are concluded by it.

On examining the whole record, we have reached the conclusion that the amounts which have been certified to by the corporation counsel are as fair and just as could be made, and we think there was authority for an allowance of compensation for the time certified by the corporation counsel at the rate of ten dollars per day.

We conclude, therefore, that the order should be modified and that the allowance of the commissioners should be of the following sums: John J. Quinlan, \$442; Daniel F. McCann, \$332; William

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J. Fisher, \$436; and as modified the order should be affirmed, with ten dollars costs and disbursements to the appellant.

VAN BRUNT, P. J., PATTERSON, INGRAHAM and LAUGHLIN, JJ., concurred.

Order modified as directed in opinion, and as modified affirmed, with ten dollars costs and disbursements to the appellant.

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MARY BELL, Plaintiff, v. THE CITY OF NEW YORK, Defendant.

*Dockage rights in New York city — specific performance of a contract by the city to purchase them — defense that the party agreeing to sell had no interest — construction of a reservation in a grant by the city of New York of land and dockage rights — an exception therefrom implies that an estate passed thereunder — exception void for uncertainty — what is an exercise of a reserved right precluding further action — effect of the city's consent to the construction and use of a pier — proviso in a lease as to the city's action — prescriptive right — application of "Sinking Fund Ordinance" — power of the common council to grant — implied consent from the city.*

In 1817 Henry Rutgers owned land in the city of New York adjoining the East river for the two blocks from Rutgers street to Clinton street, extending (high-water mark being for the most part above Water street) to the northerly line of Water street. May 1, 1817, the city, pursuant to the authority of chapter 86 of the Revised Laws of 1818, granted to him the land to be "gained out of the East River" bounded northerly by the south side of Water street, easterly by the west side of Clinton street, southerly by the northerly side of South street and westerly by the east side of Rutgers slip, excepting so much as would be necessary to extend Jefferson street, which lay between Rutgers street and Clinton street, to South street. Rutgers covenanted to build "wharves or streets" adjoining said premises and keep the same in repair, and that they should be "public streets or highways," and also, when so required, to fill and construct Water and South streets and to extend Clinton, Jefferson and Rutgers streets from Water to South street.

The grantor covenanted that the grantee "shall and lawfully may, from time to time, and at all times forever hereafter fully have, enjoy, take and hold to his and their own proper use, all manner of wharfage, crannage, advantages and emoluments growing or accruing by or from that part of the said wharf or street called South Street, which lies opposite to the hereby granted premises and fronting on the East River, excepting and reserving nevertheless so much of the said wharfage, crannage, advantages and emoluments as may accrue from so much of South Street as may be hereafter appropriated by the said

parties of the first (part) for the purpose of forming and making a public slip or basin after the said public slip or basin shall be formed and made."

In 1831 a committee appointed by the common council of the city of New York to investigate the matter of dock facilities along the East river presented a report advocating the formation of a "basin or slip" by the construction of two piers, one at the foot of Clinton street and the other about eighty feet westerly toward Jefferson street. The resolution, recommended to carry out the report, was adopted.

May 1, 1832, the executors of Rutgers conveyed to Henry W. Bool a portion of the lands abutting on South street. At that time the lots had not been filled in and the conveyance was made expressly subject to the exception or reservation and other covenants contained in the deed to Rutgers. Subsequently Bool and the other proprietors constructed, at their own expense, pursuant to a resolution of the common council, a bulkhead on the south line of South street from Rutgers street to Clinton street and filled up the water lots agreeably to the Rutgers grant.

The westerly pier of the proposed slip was not built at the point originally contemplated, but was built at the foot of Jefferson street. In 1833 the city constructed another pier 130 feet long at the easterly side of Rutgers slip. In 1844 the "Sinking Fund Ordinance" was adopted, vesting the making of grants of land under water in "the Commissioners of the Sinking Fund of the city of New York" and prohibiting the construction of bulkheads and piers under such grants except with the consent of the common council. In 1847 or thereabouts, a resolution was passed providing for the construction of a pier 300 feet long midway between Jefferson and Rutgers streets, which pier, known as pier 45 (old number), was subsequently built. June 19, 1848, William and Thomas Dennistoun acquired, through certain mesne conveyances, the premises previously conveyed to Bool, together with the wharfage rights. Such conveyances were made by express stipulations therein subject to the conditions of the Rutgers grant. In 1849 William and Thomas Dennistoun constructed, at their own expense, pursuant to a resolution of the common council, a pier 300 feet long in front of their premises, which pier is known as pier 47 (old number), East river.

At the time this pier was constructed the title of the city to the land under the water of the East river only extended to a line drawn 400 feet from low-water mark. This line intersected pier 47 at about the middle. Pursuant to authority conferred by section 6 of chapter 574 of the Laws of 1871, the Commissioners of the Land Office granted to the city the land under water to an exterior line passing beyond the pier in question.

Since 1849 the Dennistouns and their successors in interest have had possession of the pier and bulkhead and have received the wharfage therefrom, have kept it in repair and have paid taxes thereon. It does not appear whether or not the commissioners of the sinking fund took any action with reference to the construction of such pier.

In 1871 a plan for the improvement of the East river water front was adopted. This plan was not carried out, but an amended plan was adopted in 1898 which

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provided for the construction opposite the premises included in the Rutgers grant of four piers over 450 feet long.

At the time of the adoption of the amended plan Mary Bell had succeeded to the Dennistouns' title under instruments which were not made subject to the Rutgers grant. January 4, 1900, the said Mary Bell entered into an agreement with the department of docks of the city of New York, by which she agreed to convey to the city of New York for a specified sum "good title to the several rights, titles and interests in and to the said wharfage rights, etc., appurtenant to one hundred and twenty feet (120) of bulkhead and to said Pier old No. 47, East River, with the rights to the lands under water and riparian and other rights, if any, in front thereof and connected therewith not now owned by the city of New York or by the People of the State of New York." The city subsequently refused to perform this agreement upon the ground that under the grant from the city of New York to Rutgers it was entitled to the possession of the premises for the purpose of a "public basin," viz., the purpose contemplated by the plan of improvement.

In a proceeding instituted by Mary Bell to compel the specific performance of the agreement of January 4, 1900,

*Held*, without examining into the validity or extent of Bell's title, that, as she was in possession of the premises and asserted title, rights and interests therein under a claim which was more than colorable, there was a sufficient consideration to support the city's agreement and that it should be required to specifically perform such agreement;

That it would be unreasonable to construe the exception or reservation in the Rutgers grant as giving the city the right to appropriate, for a public slip or basin, the entire bulkhead opposite the two blocks originally owned by Rutgers;

That if the city based its claim upon an exception from the grant this would necessarily imply that some estate was granted to Rutgers, for otherwise the exception would be repugnant to the grant;

That, construed as an exception, such exception would be void for uncertainty as it covered nothing then in existence or capable of being identified or omitted from the conveyance;

That the proper construction of the reservation contained in the grant to Rutgers required the city to exercise its alleged rights thereunder before requiring the abutting owners to construct the wharf and piers;

That the action of the city in 1881 in deciding to construct the two piers then contemplated was an exercise of its reserved rights and an abandonment of any right to locate a public slip or basin at that point;

That, having consented to the construction of pier 47 and acquiesced in its use for a period of fifty years, it was not competent for the city to appropriate it for a public slip;

That the fact that a lease executed by Bool's executors, February 1, 1841, contained a provision for a reduction of the rent in case the city should take the bulkhead for public use was not inconsistent with the above construction of the Rutgers grant;

That the sinking fund ordinance did not apply to that portion of pier 47 which



was constructed beyond the 400-foot mark, and that the common council of the city had the right, under chapter 86 of the Revised Laws of 1813, to grant not only the city's consent to the construction of this part of the pier, but the consent of the State as well;

That, as this portion of the pier had been constructed and used under a claim of right for more than twenty years before the city obtained title to the land beyond the 400-foot line, the plaintiff had acquired a prescriptive right to maintain this part of the pier and to access thereto over the waters of the State; That the pier in question, having been constructed by the abutting owner, with the consent of the common council, the sinking fund ordinance did not apply to any portion thereof;

That, if the sinking fund ordinance did apply to the pier in question, the consent of the common council should be regarded as having been given in conformity to, and in compliance with, the sinking fund ordinance, and not as a recognition of any superior title in the city.

VAN BRUNT, P. J., dissented.

SUBMISSION of a controversy upon an agreed statement of facts, pursuant to section 1279 of the Code of Civil Procedure.

The plaintiff seeks the specific performance of an agreement in writing between her and the defendant by its department of docks, bearing date the 4th day of January, 1900. The agreement recites, among other things, that the plaintiff is the "proprietor of all the wharfage rights, terms, easements and privileges, etc., appertaining to the bulkhead" on the southerly side of South street between Jefferson and Clinton streets beginning at a point about ninety-six feet easterly of the easterly line of Jefferson street and running thence easterly to a point about one hundred and twenty feet westerly from the westerly line of Clinton street produced, "including all right and title to the wharfage rights, terms, easements, emoluments and privileges appurtenant to Pier old 47, East River, not now owned by the city of New York, and all right, title and interest in and to said pier or any portion thereof not now owned by the city of New York;" that the city, by its board of docks, subject to the approval of the commissioners of the sinking fund, is authorized to acquire by purchase "wharf property in said city and all rights appertaining thereto not now owned by the corporation;" that the city "is desirous of acquiring said wharfage rights, terms, easements and privileges, heretofore described, not now owned by the city," in accordance with a resolution of the board of docks declaring its desire to acquire said rights and property, reciting that

it appears that the plaintiff is the "owner in fee simple of the above-described premises, together with all hereditaments, including the riparian and wharfage rights," containing an offer on the part of said board to purchase the same "and to pay for a good and sufficient title thereto, free from all incumbrances," the sum of \$175,000, providing for service of the resolution on the plaintiff and requesting an answer in writing within ten days "whether she will sell the said riparian and wharfage rights and interests" for the price offered, and declaring that if such answer be not given it should be deemed that no price could be agreed upon; and then follow the terms of the contract, the material provisions of which are as follows:

The plaintiff agrees to sell and convey to the defendant by good and sufficient deed "all her right, title and interest in and to the wharfage rights, terms, easements and privileges, etc., appertaining to" said bulkhead, "including all right and title to the wharfage rights, terms, easements, emoluments and privileges appurtenant to Pier old 47, East River, and all right, title and interest in and to said pier or any portion thereof" for the sum specified in said offer. The agreement recites that it is the essence of the contract that the plaintiff is to convey or cause to be conveyed "good title to the several rights, titles and interests in and to the said wharfage rights, etc., appurtenant to one hundred and twenty (120) feet of bulkhead and to said Pier old No. 47, East River, with the rights to the lands under water and riparian and other rights, if any, in front thereof and connected therewith not now owned by the city of New York or by the People of the State of New York;" that the defendant agrees "to purchase the right, title and interest of the said party of the first part of, in and to said wharf property" for the consideration before specified.

The agreement was subject to the approval of the commissioners of the sinking fund, and they approved it. The defendant claims that under an exception or reservation contained in a grant from the city of New York, being the plaintiff's source of title, it is entitled to the possession of the premises for the purposes of a "public slip or basin," the purpose for which, according to plans on file for improving the water front, it is proposed to acquire plaintiff's interests.

In 1813 the city owned all the land along and under the East

river from high-water mark to a point 400 feet outside of low-water mark, except where it had granted the same. It acquired title from the Crown under the Dongan charter and by the Montgomerie charter. By section 219 of chapter 86 of the Revised Laws of 1813 the city was vested with the control of the water front, including authority to construct and regulate the wharves and slips, and to take, by prescribed proceedings, the ground of individuals for those purposes. It was further provided by said act that the city might lay out "regular streets or wharves of the width of seventy feet in front of those parts of the said city which adjoin to the East river" (§ 220); that the proprietors of the adjoining uplands should construct said streets or wharves according to the plan adopted by the corporation and fill in any intervening space between their respective holdings and said streets or wharves, at their own expense, and should become the owners in fee of the intermediate space upon filling in and leveling the same (§ 221); and if they did not perform the work within the time fixed, the corporation was authorized to do it and recover the expense from them (§ 222); and the expense was made a lien on the adjoining premises (§ 223); that the city might direct the construction of piers at the expense of the proprietors of the adjoining lots and, upon their default, either build the piers itself and collect the wharfage, or grant the right to build the piers and collect the wharfage to any person "in fee or otherwise" (§ 224); that the corporation might grant to the adjoining proprietors a common interest in piers according to the breadth of their respective lots located within such limits as should be deemed proper (§ 225); that it might also, at its own expense, "cause such and so many other public basins to be formed and completed" as might be deemed necessary, and receive to its own use the "slipage or wharfage arising from the same: \* \* \* Provided always, that nothing herein contained shall be construed \* \* \* to interfere with any private property or right or privilege held under grants of the said mayor, aldermen and commonalty or otherwise" (§ 228); that it might "enlarge any of the slips in the said city" and, "upon paying one-third of the expense of building the necessary piers and bridges, shall be entitled not only to the slipage of that side of the said piers which shall be adjacent to such slips respectively, but also to one-half of the wharfage to arise from the outermost end of the said

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piers" (§ 230); that if any adjoining proprietors should refuse to join in the building of piers, the corporation might join with those willing to do their part and share in the wharfage accordingly (§ 231). Failure on the part of the adjoining proprietors to build the piers within the time prescribed by a notice to be published for six weeks or to contribute to the expenses thereof as the same should accrue was to be deemed a refusal to comply with the direction of the corporation (§ 232).

In 1817 one Henry Rutgers was the owner of the uplands adjoining the East river for the two blocks from Rutgers street to Clinton street, Jefferson street intersecting his holdings. At that time high-water mark was for the most part above Water street, but Rutgers had obtained a prior grant from the city of the title from high-water mark to the northerly line of Water street. No definite plan for the improvement of the water front in this vicinity had been adopted at that time. By indenture, dated May 1, 1817, the corporation granted to him, as authorized by chapter 86 of the Revised Laws of 1813 already mentioned, the lots or land to be "gained out of the East River," bounded northerly by the south side of Water street; easterly by the west side of Clinton street; southerly by the northerly side of South street; and westerly by the east side of Rutgers slip, as the same were designated on a map annexed, excepting so much as would be necessary to extend Jefferson street to South street. The grantee covenanted that on three months' notice he would build the "wharves and streets" adjoining said premises, as designated on the map, and keep the same in repair; and that they should be "public streets or highways." This agreement obligated the grantee, when so required, to fill and construct Water and South streets, and to extend Clinton, Jefferson and Rutgers streets from Water to South street. The grantor covenanted and agreed that the grantee, his heirs and assigns, on performance of the covenants and conditions on his part, "shall and lawfully may, from time to time, and at all times forever hereafter fully have, enjoy, take and hold to his and their own proper use, all manner of wharfage, crantage, advantages and emoluments growing or accruing by or from that part of the said wharf or street called South Street, which lies opposite to the hereby granted premises and fronting on the East River, excepting and reserving nevertheless so much of the said

wharfage, crannage, advantages and emoluments as may accrue from so much of South Street as may be hereafter appropriated by the said parties of the first (part) for the purpose of forming and making a public slip or basin after the said public slip or basin shall be formed and made."

In 1831 the attention of the common council was drawn to the insufficiency of dock facilities along the East river. It was proposed by the committee to whom the matter had been referred to form a "basin or slip" at the foot of Clinton street by two piers 130 feet long, as shown on a map presented with the report of the committee. The map shows the easterly pier at the foot of Clinton street, and the other about 80 feet westerly toward Jefferson street. The report further proposed that the corporation bear one-third of the cost of the easterly pier and all of the cost of the westerly pier, reciting that the common council had "reserved the waters adjacent for public purposes." The resolution recommended to carry out the report was adopted.

By deed dated May 1, 1832, the executors of said Rutgers conveyed to one Henry W. Bool 144 feet of the lands abutting on South street opposite the bulkhead or wharf and pier. By that time the lots had not been filled up, and the conveyance was made expressly subject to the exception or reservation and other covenants and conditions in the deed to Rutgers above set forth. By a resolution adopted the preceding March, the common council had granted permission to said Bool (as if he already owned an interest in the premises) and others to sink a bulkhead on the south line of South street from Rutgers street to Clinton street, and fill up the water lots agreeably to the Rutgers grant aforesaid. Pursuant to this resolution, Bool and the other proprietors subsequently sunk the bulkhead, built the wharves or street and filled up the water lots at their own expense, agreeably to the conditions of the grant.

The proprietors of the adjacent land easterly of Clinton street were given an opportunity to join in the construction of said pier to be built at the foot of Clinton street, according to said provisions of chapter 86 of the Revised Laws of 1813, but none joined, and the city constructed that pier at its own expense in 1832. If the westerly pier had been constructed as originally proposed, it would have formed a slip or basin 80 feet wide by 130 feet long, all east-

erly of the *locus in quo*. But on the 14th of January, 1833, the street commissioner proposed to the common council to change the plan by locating the westerly pier at the foot of Jefferson street, so as to form a "capacious basin." The change was adopted and the pier built solely at public expense, without giving adjacent owners the opportunity to join in its construction afforded by the original plan. These two piers, the one at the foot of Jefferson street and the other at the foot of Clinton street, are known as pier 48 (old number) and pier 46 (old number), East river, respectively. The city has maintained them and has received the entire wharfage or profits therefrom.

In 1842 the annual quit rent reserved in the Rutgers grant was released. The city likewise in 1833 constructed pier 44 (old number), East river, 130 feet long, at the easterly side of Rutgers slip, after giving the adjacent owners an opportunity to build it themselves.

In 1844 what is known as the "Sinking Fund Ordinance" was adopted. This ordinance regulated the fiscal affairs of the city, and purported, among other things, to vest the sale and disposition of real property, including grants of land under water, in "the Commissioners of the Sinking Fund of the city of New York," composed of the mayor, recorder, comptroller and treasurer of the city, and the chairman of the finance committee of the board of aldermen and assistant aldermen, respectively. The construction of bulkheads and piers under such grants, however, was inhibited, except with the consent of the common council. Chapter 225 of the Laws of 1845 authorized the city to borrow money for the purpose of liquidating the damages and expenses of introducing Croton water into the city, inhibited the amendment of said ordinance without consent of the Legislature, and provided that "the said ordinance shall remain in full force until the whole of the debt created for the introduction of the Croton water into the city of New York shall be fully redeemed."

It appears from the report of the committee on wharves, etc., to the council in 1847, that the city did not have enough piers to accommodate its commerce, and that the opinion was prevalent that wharfage property did not yield fair returns. Resolutions were adopted directing the construction of several piers, among them one

300 feet long midway between Jefferson and Rutgers streets, and providing that notice be given to the adjacent proprietors to unite in the construction of said piers. One lot owner remonstrated against the pier, and only one offered to join or to build it all at his own expense. He was permitted to build it all, but it was provided that if others should elect to pay their share on or before completion, they should be permitted to do so and to share in the pier according to their respective holdings. The pier was built by one adjacent owner, who has held possession thereof and received the wharfage therefrom. This is known as pier 45 (old number) East river, and is not directly involved in this case.

On the 19th of June, 1848, William Dennistoun and Thomas Dennistoun acquired, through certain mesne conveyances, the premises previously conveyed to Bool, together with the wharfage rights. The consideration stated in the deeds to them was \$42,000 for the lots and \$6,000 for the property in the wharf. These deeds were made, by express stipulation therein, subject to the conditions of the Rutgers grant of 1817.

On the 10th of February, 1849, a resolution of the common council was approved, directing that a pier 300 feet long by 40 feet wide be built midway between Clinton and Jefferson streets, and that notice be given to the proprietors of lots lying opposite to unite in the construction of the pier. This resolution was adopted agreeably to a petition presented by the proprietors and lessees of the lots opposite. W. and T. Dennistoun were the only proprietors that offered to join in building the pier, and they offered and were permitted by resolution, approved April 17, 1849, to erect the pier at their own expense, on condition that others should be permitted to share in the pier on paying a proportionate part of the expense on or before the completion thereof.

The pier was directly opposite the lots of W. and T. Dennistoun; they completed it in 1849; none of the adjoining proprietors elected to join in the expense; and they and their grantees have always had possession of the pier and bulkhead and exclusively received the wharfage therefrom. This is known as pier 47 (old number), East river, and is the pier in controversy. The plaintiff is the niece of William and of Thomas Dennistoun, and fully succeeded to their title prior to 1878. Said property has all been assessed as real

property, and the taxes thereon paid by the plaintiff and her predecessors. The bulkhead and pier have been kept in repair and the slips on each side dredged by plaintiff and her predecessors at their own expense and as required by the city authorities. The pier was practically rebuilt in 1868, and again in 1882, by plaintiff and her predecessors in title. It does not appear that the commissioners of the sinking fund took any action with reference to the construction of the pier, or that they did not.

In 1871 a plan was adopted by the board of docks, and approved by the commissioners of the sinking fund, for the improvement of the water front along the East river, including that opposite the bulkhead and pier in question. This plan contemplated an exterior street 250 feet wide, including the 70 feet of South street, and piers extending at designated points into the river. This action was taken under section 6 of chapter 574 of the Laws of 1871 (amdg. Laws of 1870, chap. 137, § 99), which contemplated that "rights, terms, easements and privileges" not owned by the corporation and pertaining to any wharf should be acquired by purchase or condemnation. The essential provisions of this statute have been continued in the successive city charters (Laws of 1882, chap. 410, § 711 *et seq.*; Laws of 1897, chap. 378, § 816 *et seq.*), and the authority to alter the plans conferred on the department of docks with the approval of the commissioners of the sinking fund. An amended plan was adopted in 1898 and approved in 1899, the plan of 1871 not having been carried out. The amended plan contemplates an exterior street 150 feet wide, including the 70 feet of South street, and piers located at designated points extending into the river. Opposite the original grant, extending from Rutgers to Clinton street, there are designated four piers, all over 450 feet long, forming three spaces, slips or basins, where there are now five shorter piers, forming four spaces, slips or basins.

At the time of the grant to Rutgers the land under the waters of the East river, beyond the 400 feet from low-water mark, was vested in the People of the State of New York. A line 400 feet from low-water mark appears to intersect the piers in question at about the middle. Pursuant to authority conferred by section 6 of said chapter 574 of the Laws of 1871, the Commissioners of the Land Office granted to the city the land under the waters of the



East river to an exterior line defined in said grant passing beyond the end of the pier in question.

The foregoing are the only facts deemed material.

*Theodore De Witt*, for the plaintiff.

*Theodore Connoly*, for the defendant.

LAUGHLIN, J. :

The agreement was executed as authorized by law, in lieu of proceedings to acquire the plaintiff's title or rights by eminent domain. There is no claim of fraud or mistake and no demand for a rescission or reformation of the contract. No definite theory seems to be developed or presented for relieving the city from the fulfillment of its contract. The argument of the learned counsel for the city is not that the plaintiff has no property rights or interest to convey, but that the city, under the reservation in its grant to Rutgers, is authorized to appropriate this pier and bulkhead or wharf by establishing a public slip or basin, and that, therefore, it becomes unnecessary at the present time to acquire any other rights or interests she may have.

Under the provisions of the act of 1871, to which reference is made in the statement of facts, the department of docks, in addition to being authorized to acquire title where the city had no title, was authorized to acquire by agreement or condemnation "any rights, terms, easements and privileges" pertaining to any wharf not already owned by the city. If, therefore, the plaintiff had any right, title or interest to convey, it was competent for the city, through its department of docks, to purchase the same. No question of adequacy of consideration is presented or could be raised on this record, and it is not shown that the enforcement of the agreement would be unfair, inequitable or unjust, requiring that a decree for specific performance be withheld. (*Winne v. Winne*, 166 N. Y. 263.) If the plaintiff is able to convey or release the right, title and interest which she has agreed to convey or release, it would seem, therefore, that she is entitled to judgment for specific performance.

The first question to be considered is, what has the plaintiff agreed to convey or release? It is not shown that the commis-

sioners of docks were not aware of the reservation in the grant from the city to Rutgers at the time they entered into this agreement with the plaintiff. The agreement indicates that they were aware that the city probably had some title or interest in the premises. It is a reasonable assumption that in the performance of their important duties, aided by the advice of counsel, they became familiar, in a general way at least, with the grants of water rights and privileges previously made by the city. In these circumstances the defendant in making the contract is chargeable with knowledge of the rights and privileges previously reserved by the city itself. The contract in question should, therefore, be construed in this light. Thus construed, it is clear that the agreement on the part of the plaintiff was to sell and convey all outstanding right, title and interest not owned by the city or by the People of the State; and the reasonable construction of the agreement is that she represented that she owned and was able to convey good title to all such outstanding rights, titles and interests. The city, of course, was not chargeable with knowledge as to where the title to these outstanding rights, titles and privileges was vested. The plaintiff was in possession, claiming ownership. The object of this agreement was to acquire the outstanding rights so that the city would have, with the title it then possessed as the owner of the fee, and with the title it had acquired or might thereafter acquire from the State, complete title. It is clear that if there is any outstanding right, title or interest not owned by the city or the People, it is owned by the plaintiff. There was a good consideration for the agreement. She was in possession, claiming title, rights and interests, and her claim was something more than colorable. We might very well end the discussion with a statement of the grounds upon which she could, at least with much plausibility and force, assert title, whether successfully or not; but in view of the importance of the litigation we deem it proper to consider the validity and extent of the plaintiff's title.

The city unquestionably owns the fee of South street; but South street was built by the plaintiff's predecessors in title pursuant to the covenant contained in the grant to Rutgers; and through that grant her predecessors in title and the plaintiff acquired the right

to wharfage on that part of the bulkhead opposite her premises, subject only to the reserved right of the city to appropriate part of the bulkhead included within the original grant for the purpose of a public slip or basin. It is contended on the part of the city that this reserved right has never been exercised, and that it is now at liberty, under the plan of dock improvements adopted in 1898, to claim the benefit thereof. That plan does not purport to be an appropriation of a public slip or basin under the reservation contained in the grant to Rutgers. It is a general plan for dock improvements, embracing the entire frontage covered by the grant to Rutgers and more. It contemplates four piers opposite the premises embraced in this original grant and three slips or basins in between. The city's reserved right was to locate, not three public slips or basins, but only one, and at the time the dock improvement of 1898 was adopted there were and are now five piers, with water between, opposite this tract. These five piers were constructed by authority of the city and have been in use for more than fifty years. It appears that ever since 1833, when the city changed its original plan and constructed the second pier opposite Jefferson street, instead of eighty feet westerly of the first pier, which was at the foot of Clinton street, the plaintiff and her predecessors in title have exercised the sole right of collecting wharfage and cranage along the bulkhead opposite the premises now owned by her. It also appears that pier 47 was constructed by the plaintiff's predecessor in title with the consent of the city in 1849, and that they and she have ever since exercised the exclusive right to the use thereof, including collecting wharfage and cranage thereon, and have kept the pier in repair, dredged adjacent thereto by direction of the city authorities, and that the same has been continuously taxed to them as real estate and they have paid the taxes thereon. The city having directed or consented to the construction of these piers, and having acquiesced in their construction and use for fifty years, it is not competent for it now to make an appropriation of part or all of this bulkhead for a public slip or basin. It should be deemed to have exercised its reserved rights in determining upon the first plan of dock improvements made in 1831, by which no part of the bulkhead adjacent to the plaintiff's premises was attempted to be appropriated. A reserved right is limited by the rule of reasonable enjoy-

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ment. (*Grafton v. Moir*, 130 N. Y. 465.) An exception or reservation must be construed most favorably to the grantee. (*Blackman v. Striker*, 142 N. Y. 555.) It would be unreasonable to construe the exception or reservation as giving the grantor the right to appropriate the entire bulkhead opposite the two blocks for a public slip or basin, and would render the same void on the ground of repugnancy. (*Schermerhorn v. Negus*, 1 Den. 448; *Craig v. Wells*, 11 N. Y. 315; *Jones v. Port Huron E. & T. Co.*, 171 Ill. 502; *De Peyster v. Michael*, 6 N. Y. 467; *Greene v. Greene*, 125 id. 506, 512.)

If the city bases its claim on an exception from the grant, this necessarily implies that some estate was granted, for otherwise the exception would be repugnant to the grant. (*Craig v. Wells*, *supra*.) Construed as an exception, the exception would also be void for uncertainty, for it covered nothing then in existence or capable of being identified and omitted from the conveyance. (*Thompson v. Gregory*, 4 Johns. 81; *Flaherty v. Cary*, 62 App. Div. 116, and cases cited.) This case is distinguishable from *Consolidated Ice Company v. Mayor* (53 App. Div. 260; 166 N. Y. 92), in that there the street excepted from the grant had been laid out upon maps and was clearly defined and capable of being located, whereas, here the public slip or basin had not been laid out. It will be seen from the statement of facts that the city did not require the plaintiff's predecessor in title to construct South street until 1832, which was after it had determined upon the erection of the two piers in 1831. Whatever election the city desired to make should have been made before requiring these improvements. The abutting owners were justified in assuming, therefore, that the action of the city in 1831 was an appropriation under this reservation. That seems to have been the practical construction placed upon the grant and acquiesced in by all the parties ever since. The city contends that the action of Bool's executors in leasing the abutting property on February 1, 1841, with a proviso in the lease for a reduction in the rent in case the city should take the bulkhead for public purposes, is inconsistent with this theory. The city was not a party to that lease. The admission should not be deemed an estoppel as against the executors. It does not show that the executors recognized the right of the city, but it was rather a provision inserted presumably

to satisfy the tenants. It is not reasonable to suppose that it was within the contemplation of the parties when pier 47 was constructed in 1849, that it was subject to removal at any time by the city's electing to locate a public slip or basin there. The fair and reasonable construction of this reservation required that the city should make the appropriation which it claimed the right to make thereunder, before requiring the abutting owners to construct the wharf and piers. Such seems to have been its understanding of its rights at the time. Having directed these improvements and authorized the construction of pier 47, it should be deemed to have waived or abandoned any right to locate a public slip or basin at that point. (*Snell v. Levitt*, 110 N. Y. 595; *Cartwright v. Maplesden*, 53 id. 622; *Crocker v. Crocker*, 5 Hun, 587.)

Subject to the reservation, though in the form of a covenant, the deed to Rutgers conveyed an indefeasible estate of inheritance in the bulkhead, street or wharf, and the proceedings for the construction of the pier vested a like estate therein which neither the city nor the State, although owning the fee in remainder, can take from the proprietors without compensation. (*Bedlow v. Stillwell*, 158 N. Y. 292, and cases cited; *Langdon v. Mayor*, 93 id. 129.)

It appears that the outer end of pier 47, embracing more than one-half of the entire pier, was constructed on land owned by the State, being beyond 400 feet from low-water mark. The sinking fund ordinance did not apply at least to this part of the grant, for its operation was limited to grants of land owned by the city, and the common council had the right under chapter 86 of the Revised Laws of 1813 to give, not only the city's consent to the construction of this part of the pier, but the consent of the State as well. (*Langdon v. Mayor*, 93 N. Y. 129; *Williams v. Mayor, etc.*, 105 id. 419; *Bedlow v. N. Y. Floating Dry Dock Co.*, 112 id. 263.) It was constructed and used under a claim of right for more than twenty years before the city obtained from the State title to the land beyond the 400-foot line. This gave the plaintiff a right by prescription to maintain this part of the pier and to access thereto over the waters of the State. (*Bedlow v. N. Y. Floating Dry Dock Co.*, *supra*; *Bedlow v. Stillwell*, 158 N. Y. 292, and cases cited.)

Moreover, the sinking fund ordinance did not apply to grants for

the construction of piers by abutting proprietors, but only in case of their refusal to construct piers when required. Such proprietors had a vested right of pre-emption, under the statute, to construct and acquire all piers that might thereafter be ordered or authorized on that part of the wharf in which they had such interest (*Bedlow v. N. Y. Floating Dry Dock Co.*, *supra*); but the common council was first required to determine that the public interests would be subserved by the construction of the pier which, it has been seen, was done in this case. This having been determined, and construction by the abutting owners having been consented to by the common council, they had the right to build and to own and hold the pier and all rights necessary to its enjoyment. (*Mayor v. Hart*, 95 N. Y. 443; *Williams v. Mayor*, 105 id. 419; *Bedlow v. N. Y. Floating Dry Dock Co.*, 112 id. 263; *Bedlow v. Stillwell*, *supra*.) If the abutting proprietors refused to construct a pier, then a grant might be made to others, and the sinking fund ordinance would doubtless apply.

The case of *Mayor v. N. Y. C. & H. R. R. Co.* (69 Hun, 324; 147 N. Y. 710), cited by the defendant to the contrary, is not an authority in its favor. The pier in that case was erected by one having a grant, but who was not an abutting owner and had no right by prescription. As has been seen, the consent of the common council was necessary to the erection of piers, even under grants made by the city expressly for that purpose as provided by the sinking fund ordinance. If the sinking fund ordinance did apply to the construction of this pier, the consent of the common council should be regarded as having been given in conformity to and compliance with the sinking fund ordinance, and not as a recognition of any superior title in the city. If a grant from the commissioners of the sinking fund was necessary, it will be presumed to have been made after such a great lapse of time, and the plaintiff's right to this pier is good by prescription. (*Lewis v. N. Y. C. & H. R. R. Co.*, 162 N. Y. 202, 223.)

Part of the plaintiff's title came by will and part by conveyances, but in neither is her title made subject to the Rutgers grant. It thus appears that she acquired her title, not in recognition of the city's right to make any further appropriation under the reservation contained in the grant to Rutgers. She came into title and has

exercised her rights on the assumption that whatever rights the city reserved had been previously exercised; which clearly distinguishes this from the case of *Mayor v. Law* (6 N. Y. Supp. 628; 125 N. Y. 380, 394).

It thus appears, we think, that the plaintiff had substantial property rights and all the title that it was within the contemplation of the parties that she should convey.

It follows, therefore, that the plaintiff should have judgment on the submission for the specific performance of the contract, with costs, as demanded in the submission.

PATTERSON, O'BRIEN and McLAUGHLIN, JJ. concurred; VAN BRUNT, P. J., dissented.

Judgment ordered for plaintiff, with costs.

H. WHITNEY TEW, Respondent, v. HENRY WOLFSOHN, Appellant,  
Impleaded with PAULA WOLFSOHN.

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*Demurrer — it will not lie for a misjoinder of parties defendant — action against both an agent and his undisclosed principal — complaint not demurrable for misjoinder of two causes of action nor as not stating a cause of action against the agent — when the plaintiff must elect which he will hold liable.*

A demurrer will not lie for a misjoinder of parties defendant. The phrase "defect of parties," used in subdivision 6 of section 488 of the Code of Civil Procedure, authorizing a demurrer for a defect of parties plaintiff or defendant, means a non-joinder of parties and not a misjoinder.

A complaint in an action brought against an agent and his undisclosed principal upon a contract made by the agent on behalf of such undisclosed principal states but a single cause of action, and is, therefore, not demurrable on the ground that two causes of action have been improperly united therein, nor on the ground that it does not state a cause of action against the agent.

Assuming that, in such a case, the plaintiff is only entitled to judgment against one of the defendants and that he must elect which party he intends to hold, he cannot be required to make such election until the close of the case. The bringing of the action against both the agent and the undisclosed principal does not operate as an election to hold the undisclosed principal and not the agent.

Per LAUGHLIN and O'BRIEN, JJ. The doctrine of election should not be applied in such a case until the debt has been satisfied by either the agent or the undisclosed principal.

VAN BRUNT, P. J., and McLAUGHLIN, J., dissented.

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APPEAL by the defendant, Henry Wolfsohn, from an interlocutory judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 23d day of May, 1902, upon the decision of the court, rendered after a trial at the New York Special Term, overruling said defendant's demurrer to the complaint.

*Benno Loewy*, for the appellant.

*Gilbert Ray Hawes*, for the respondent.

LAUGHLIN, J.:

The action is brought to recover damages for a breach of a contract alleged to have been made between the respondent and the appellant for an undisclosed principal, his wife the other defendant, by which the respondent, a professional singer, constituted the appellant his sole manager for America and Canada for a term of three months, and the appellant agreed to arrange a concert tour and to secure engagements for the respondent in advance, and to recover money advanced to the appellant by the respondent and also money received by the appellant for the respondent. The sole ground of the demurrer is that causes of action have been improperly united. That is the only question necessarily presented by the appeal, but the trial court would not be aided by our decision if it were confined to that point, and for this reason we deem it proper to discuss the entire question relating to the appellant's liability which has been quite fully argued and considered.

*First.* The appellant contends that two causes of action are stated in the complaint, one against him for making the contract in form as principal which does not affect his wife, and the other against her as the undisclosed principal which does not affect him. We think that the complaint states but a single cause of action. Only one contract was made, but the plaintiff seeks to hold both defendants, the wife because the contract was made for her, and the husband because he led the plaintiff to believe he was making it for himself. (*McLean v. Sexton*, 44 App. Div. 520.) Clearly on the facts alleged either party is liable to the plaintiff on the contract set forth. The demurrer is not upon the ground that the complaint fails to state facts sufficient to constitute a cause of action against



the appellant. Moreover, the complaint clearly states a cause of action against the appellant, he not having disclosed both the fact that he was acting as agent and the name of his principal. (*McClure v. Central Trust Company*, 165 N. Y. 128; *De Remer v. Brown*, Id. 410.)

A demurrer for misjoinder of parties plaintiff is authorized (Code Civ. Proc. § 488, subd. 5), but not of parties defendant. Demurrer will also lie for a defect of parties plaintiff or defendant. (Code Civ. Proc. § 488, subd. 6.) But a "defect" of parties as used in this provision of the Code means an omission and not a misjoinder. In other words, it means that some one should have been sued who has not been joined, and not that too many have been joined as defendants. (*Martin v. Buck*, 11 Johns. 271; *New York & New Haven R. R. Co. v. Schuyler*, 17 N. Y. 592; *Palmer v. Davis*, 28 id. 242; *McIntosh v. Ensign*, Id. 169; *Potter v. Ellice*, 48 id. 321; *Richtmyer v. Richtmyer*, 50 Barb. 55; *Brownson v. Gifford*, 8 How. Pr. 389; *Nichols v. Drew*, 94 N. Y. 22.)

Even if the plaintiff must elect before judgment to determine which party he intends to hold, it cannot be said that by bringing this action against both there has been an election to hold the principal and not the agent. (*Matlage v. Poole*, 15 Hun, 556.) Of course the complaint does not show which party was served first or whether the other defendant was served at all.

*Second.* Assuming that the plaintiff is only entitled to judgment against one of the defendants and that he must elect which party he intends to hold, he cannot be required to make that election until the close of the case. With the exception of the case of *Booth v. Barron* (29 App. Div. 66), the facts in which are not fully stated and which has been expressly disapproved by *McLean v. Sexton* (*supra*), all of the decisions in this jurisdiction, so far as they have been brought to our attention, are to the effect that there is no conclusive election until judgment is entered against one or the other of the parties liable. (*Matlage v. Poole*, 15 Hun, 556; approved in *Equitable Foundry Co. v. Hersee*, 33 Hun, 169-178; *Cobb v. Knapp*, 71 N. Y. 348; *Nason v. Cockcroft*, 3 Duer, 366; *Tut-hill v. Wilson*, 90 N. Y. 423; *Meeker v. Claghorn*, 44 id. 349; *Lindsay v. Gager*, 11 App. Div. 93.) Such seems to be the rule in England. (*Curtis v. Williamson*, L. R., 10 Q. B. 57.) It would

be manifestly unjust to require the plaintiff to elect in such case, at least before all of the evidence is in. Neither defendant can be prejudiced by his not electing, and the plaintiff, if he elected to hold the agent, might be defeated upon the ground that both the agency and the name of the principal were disclosed, and, if he elected to hold the principal, the jury might find that the contract was not made for the latter.

*Third.* I see no sound basis for the application of the doctrine of election in cases of this character until there has been not only a recovery against either the principal or agent, but a satisfaction of the judgment as well. I recognize that this doctrine is inconsistent with the dicta contained in many decisions and it is perhaps inconsistent with the general doctrine stated by the courts, particularly in *Tuthill v. Wilson* (*supra*), but it is not without precedents. The rule is thus stated broadly in *McLean v. Sexton*, which was an action to foreclose a mechanic's lien, where it was sought to hold both an agent and an undisclosed principal for the deficiency. I see nothing in the nature of that action to distinguish it from this and find nothing in the opinion indicating any intention on the part of the court to limit the doctrine to the case of the foreclosure of such liens. Such is also the doctrine of the courts of Pennsylvania. (*Beymer v. Bonsall*, 79 Penn. St. 298.) The Pennsylvania case was cited with approval by our Court of Appeals in *Cobb v. Knapp* (*supra*). This doctrine is also sustained, I think, by the case of *First National Bank v. Wallis* (84 Hun, 376; *affd.*, 156 N. Y. 663). In that case judgment was recovered against a corporation upon a note, apparently upon the ground that it was the maker, the note having been signed by its president and treasurer with the abbreviations of the titles of their respective offices following their signatures; but the judgment was not paid. Subsequently an action on the note was brought against the president and the treasurer individually, it having been decided that on the face of the note they were the makers. (*First National Bank v. Stuetzer*, 80 Hun, 435.) The individuals when sued sought to escape liability on the ground that the bank, by proceeding against the corporation to final judgment, exercised a right of election between inconsistent remedies, but the court held that their liability could only be determined by payment of the debt; and, as has been stated, this

decision was affirmed by the Court of Appeals. The doctrine of election, in its general application, is inequitable and harsh, and it should not be applied to an action brought upon a contract made by an agent without disclosing his principal, until the debt has been satisfied by one or the other.

It follows that the interlocutory judgment should be affirmed, with costs, but with leave to the appellant to answer upon payment of the costs of the demurrer and of the appeal.

O'BRIEN, J., concurred; PATTERSON, J., concurred in all but third branch of this opinion; VAN BRUNT, P. J., and McLAUGHLIN, J., dissented.

Judgment affirmed, with costs, with leave to appellant to answer on payment of costs of demurrer and of appeal.

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HELEN POTTS HALL, Respondent, v. THEOPHILUS GILMAN and EDWARD L. NORTON, as Administrators, etc., of GEORGE FRANCIS GILMAN, Deceased, and Others, Defendants, Impleaded with CAROLINE R. GABOZYNSKI, Appellant. (No. 1.)

*Agreement by a person to leave all his property to one who should live with him as a daughter — specific performance thereof — action against the promisor's administrators and heirs — a demurrer does not lie for a misjoinder of parties defendant — multifariousness.*

Helen Potts Hall brought an action against the administrators of the estate of George F. Gilman, deceased, his heirs at law and all others interested in his estate, to compel the specific performance of a contract alleged to have been made between the plaintiff and George F. Gilman, by which Gilman agreed that if the plaintiff "should continue to live with him and care for him as a daughter until the time of his death she should have and be entitled to all his property, both real and personal, as fully and to the same extent as if she were his sole lawful issue."

The complaint alleged that Gilman was a childless widower who was under no moral or legal obligations to his collateral relatives and lived on unfriendly terms with them; that several years prior to his death the decedent "having conceived a strong personal regard for this plaintiff, and being desirous that she should become a member of his household, adopted this plaintiff as his daughter, and did make her a member of his household and thereafter until the time of his death, plaintiff resided with him as his daughter, receiving

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from him the care, support and affection of a father, managing his household and rendering to him the same obedience and affection as if she had been his natural daughter;" that the agreement in suit was made a few months prior to the decedent's death, "in consideration of said services and affection and as an inducement for her to render the same as long as he lived and for other good and valuable considerations;" that the plaintiff duly performed the contract on her part and that the services rendered by her pursuant thereto were of great value to the decedent, but were "of such a character that they cannot be readily admeasured and are not capable of exact ascertainment or valuation."

*Held*, that a demurrer interposed to the complaint by a defendant who was a daughter of a deceased sister of the decedent should be overruled;

That the agreement, as stated in the complaint, was not void for uncertainty or on the ground that it was against public policy;

That it could not be said, as matter of law, that specific performance of such agreement should not be enforced;

That the complaint stated but a single cause of action and was, therefore, not demurrable on the ground that a cause of action against the decedent's administrators was united with a cause of action against his heirs;

That it was proper to unite all of the parties interested in the estate in order to avoid a multiplicity of suits and procure an adjudication that would finally determine the question;

That the question whether or not the complaint stated a cause of action as to all of the other defendants did not concern the demurring defendant.

A demurrer will not lie for a misjoinder of parties defendant, but it will lie for a defect of parties defendant. The defect of parties defendant for which a demurrer will lie means a non-joinder and not a misjoinder of parties.

A demurrer on the ground of multifariousness is not authorized by the Code of Civil Procedure.

APPEAL by the defendant, Caroline R. Garczynski, from an interlocutory judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 9th day of September, 1902, upon the decision of the court, rendered after a trial at the New York Special Term, overruling the said defendant's demurrer to the amended complaint.

*Raphael J. Moses*, for the appellant.

*George C. Lay*, for the respondent.

LAUGHLIN, J.:

This is an action for the specific performance of an agreement alleged to have been made with the plaintiff by George F. Gilman, since deceased, "that if she should continue to live with him and

care for him as a daughter until the time of his death, she should have and be entitled to all his property, both real and personal, as fully and to the same extent as if she were his sole lawful issue." The plaintiff alleges that the decedent was an inhabitant of the city and county of New York; that he died at Bridgeport, Conn., on the 3d day of March, 1901; that he entered into the agreement with her on or about the 1st day of November, 1900; that several years prior to his death the decedent "having conceived a strong personal regard for this plaintiff, and being desirous that she should become a member of his household, adopted this plaintiff as his daughter, and did make her a member of his household and thereafter until the time of his death, plaintiff resided with him as his daughter, receiving from him the care, support and affection of a father, managing his household and rendering to him the same obedience and affection as if she had been his natural daughter;" that the agreement was made "in consideration of said services and affection and as an inducement for her to render the same as long as he lived and for other good and valuable considerations;" that the "plaintiff did at all times since the making of said agreement and up to the time of the decease of the said George F. Gilman, perform the said agreement on her part, according to the true intent thereof, abandoning for such purpose, and upon the wish and desire of said Gilman, all other prospects in life, and devoting herself solely to his care, welfare and happiness as a daughter should;" that the considerations and services so rendered to the decedent by the plaintiff were of great value and benefit to him, were so appreciated and regarded by him and were no less than would have been rendered by a daughter, "but that the same are of such a character that they cannot be readily admeasured and are not capable of exact ascertainment or valuation;" that at the time of executing the agreement the decedent "was a widower and childless and so continued until his death; that he had no relatives who resided with him or who were dependent upon him in any manner or to whom he owed any legal or moral duty to care for them or provide for them out of his means or estate or who were in any manner entitled to look to him for pecuniary aid or who had any moral claim to be considered as the objects of his testamentary bounty;" that his nearest relatives were a sister and two brothers all of the half blood, nephews and nieces,

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grandnephews and grandnieces and more remote collateral relatives; that "none of said relatives lived on terms of intimacy or cordiality with the said George F. Gilman, but on the contrary all of them had for many years been estranged from him and many of them were bitterly hostile to him;" that the decedent failed and neglected to make a will confirming his agreement with the plaintiff and died intestate, owning upwards of one and a half million dollars.

The appellant, according to the allegations of the complaint, is the daughter of a deceased sister of said George F. Gilman. The first ground of her demurrer is that the amended complaint does not state facts sufficient to constitute a cause of action against her. Her first point in this regard is that the allegations of the complaint are insufficient to establish any claim on the part of the plaintiff as an adopted daughter of the decedent. This is apparently conceded by the respondent and, therefore, need not be considered.

The appellant further contends that the agreement is void for uncertainty and that the circumstances are not such as would justify a court of equity in enforcing specific performance. Upon demurrer where, as here, the demurrer is upon the ground that the complaint does not state facts sufficient to constitute a cause of action, it must be assumed that all of the facts alleged in the complaint as well as those that may be inferred or implied therefrom by reasonable and fair intendment are true. (*Coatsworth v. Lehigh Valley R. Co.*, 156 N. Y. 451.) Tested by this rule the complaint, we think, sufficiently states an agreement "reasonably certain as to its subject-matter, its stipulations, its purposes, its parties and the circumstances under which it was made" (*Stokes v. Stokes*, 148 N. Y. 716; 3 Pom. Eq. Juris. § 1405), to give a court of equity jurisdiction to compel specific performance. She does not expressly allege that she accepted the agreement and remained with the decedent pursuant thereto; but she avers that the decedent "entered into" the agreement with her and that she fully performed it on her part. Therefore, it may fairly be inferred, under the rule stated, that she agreed with the decedent to do the things upon which his agreement to leave her the property was conditioned. Nor can it be said on the allegations of this complaint that the contract was void as against public policy. The testator was a widower and had no issue and was on unfriendly terms with all his collateral relatives. It

would, therefore, have been competent for him to have given all of his property to the plaintiff during his lifetime or to have left it all to her by will. It was equally competent for him to make a valid agreement with her for a sufficient consideration, of the nature of that alleged which is incapable of exact money value, that she should receive all of his property upon his death, and if a definite agreement, either parol or in writing, to that effect be clearly shown by satisfactory evidence, a court of equity may, in its discretion, decree a specific performance thereof where it does not appear that the enforcement of the agreement would be "unfair, inequitable or unjust." (*Winne v. Winne*, 166 N. Y. 263; *Healy v. Healy*, 55 App. Div. 315; *affd.*, 166 N. Y. 624; *Gates v. Gates*, 34 App. Div. 608; *Brantingham v. Huff*, 43 *id.* 414; *Parsell v. Stryker*, 41 N. Y. 480.) Contracts of this character, especially those resting in parol, are justly regarded with suspicion, and the evidence adduced to establish them should be carefully scrutinized to avoid the perpetration of fraud upon the lawful heirs. (*Shakespeare v. Markham*, 10 Hun, 324; *affd.*, 72 N. Y. 400; *Gall v. Gall*, 64 Hun, 600; *affd.*, 138 N. Y. 675; *Matthews v. Matthews*, 62 Hun, 111.)

It cannot be said as matter of law that performance of this agreement should not be enforced. That question will rest in the first instance in the sound discretion of the court of equity to be exercised upon the evidence as presented upon the trial. The rule applicable to the specific performance of such agreements is well stated by MARTIN, J., in *Winne v. Winne* (*supra*) as follows: "The right to the specific performance of a contract rests in judicial discretion and may be granted or withheld upon a consideration of all the circumstances, and in the exercise of a sound discretion. (*Seymour v. Delancey*, 6 Johns. Ch. 222; *Margraf v. Muir*, 57 N. Y. 155; *Conger v. N. Y., W. S. & B. R. R. Co.*, 120 N. Y. 29; *Stokes v. Stokes*, 155 N. Y. 590.)

"Therefore, in cases of this character, where it appears for any reason that the enforcement of an agreement would be unfair, inequitable or unjust, the remedy should be denied. Each case must be governed by its own facts and circumstances, and unless the proof discloses a situation where good conscience and natural justice require the enforcement of the agreement, this relief should not be awarded."

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The complaint shows that there are conflicting claims with reference to the residence of the decedent, it being claimed by some of the defendants that he was a resident of Connecticut, and by others that he was a resident of New York. That does not affect the question now presented. It is alleged that he resided in this State; but whether he did or not, if she established the agreement, the court may at least award to her the property within its jurisdiction.

The second ground of demurrer is that a cause of action against the decedent's administrators for specific performance of his contract is united with a cause of action against his heirs. The complaint shows the appointment of an administrator in New York and another in Connecticut, and they are made parties defendant. The complaint states but a single cause of action based upon the agreement made by the decedent with the plaintiff. The plaintiff has joined the administrators and the heirs and all parties claiming an interest in either the real or personal estate. It cannot be said that causes of action have been improperly united when only one cause of action is stated. The suit being in equity, it is not essential that all the parties should be interested in the same way or affected alike by the judgment demanded. The important question of fact is the establishment of the contract; and the same evidence that will establish it as to the real property will establish it as to the personal property. It was proper to unite all of the parties interested to avoid a multiplicity of suits and have an adjudication that would determine the question as to all parties interested in the estate. Moreover, this has been the practice in this class of actions. The object of the action is to reach the property of the decedent, both real and personal, and to have the same delivered to the plaintiff and to have the claims of those asserting title or interest thereto adjudicated.

A third ground of demurrer is interposed which does not seem to conform to the provisions of the Code. The appellant's counsel in his points interprets it as a demurrer upon the ground of multifariousness. This is not a ground of demurrer authorized by the Code. It is stated in the third ground of demurrer that the complaint alleges a cause of action against the administrators in New York, against the administrators in Connecticut, against the defendants Hartford and Smith who were partners of the decedent, and against



the heirs; and that these causes of action relate to separate and distinct matters. If this is to be construed as a demurrer upon the ground that causes of action have been improperly united it has already been answered. Whether or not a cause of action is stated against all of the other defendants does not concern the appellant. She is an heir at law of the decedent and a cause of action is sufficiently stated against her. A demurrer will lie for a defect of parties plaintiff or defendant (Code Civ. Proc. § 488, subd. 6); and upon the ground that there is a misjoinder of parties plaintiff (Id. subd. 5), but a demurrer will not lie for misjoinder of parties defendant. A defect of parties for which a demurrer lies means a nonjoinder and not a misjoinder of parties plaintiff or defendant. (*New York & New Haven R. R. Co. v. Schuyler*, 17 N. Y. 592; *Palmer v. Davis*, 28 id. 242; *Potter v. Ellice*, 48 id. 321.)

It follows, therefore, that the interlocutory judgment should be affirmed, with costs, but with leave to appellant to answer upon payment of the costs of the appeal and of the demurrer.

VAN BRUNT, P. J., PATTERSON, O'BRIEN and McLAUGHLIN, JJ., concurred.

Judgment affirmed, with costs, but with leave to appellant to answer on payment of costs of appeal and demurrer.

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HELEN POTTS HALL, Respondent, v. THEOPHILUS GILMAN and EDWARD L. NORTON, as Administrators, etc., of GEORGE FRANCIS GILMAN, Deceased, and Others, Defendants, Impleaded with MINNIE N. LITTLE, Appellant. (No. 2.)

*Venue of an action affecting real estate and personality where none of the parties reside in the county where the real estate is.*

The venue of an action affecting the title to "a large amount of real and personal property, consisting of houses and lands in the City and County of New York, in the State of New York, and in the City and Town of Bridgeport, in the State of Connecticut, and elsewhere, and of goods, chattels and money and securities for money in the States of New York and Connecticut and elsewhere," is properly laid in New York county under the provisions of section 962 of the Code of Civil Procedure, although the complaint does not show whether any of the parties reside in that county.

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APPEAL by the defendant, Minnie N. Little, from an interlocutory judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 9th day of September, 1902, upon the decision of the court, rendered after a trial at the New York Special Term, overruling the said defendant's demurrer to the amended complaint.

*John J. Crawford*, for the appellant.

*George C. Lay*, for the respondent.

LAUGHLIN, J. :

The appeal in this case is from the same interlocutory judgment as was involved in the appeal by Caroline R. Garczynski in the same action. (*Hall v. Gilman*, No. 1, 77 App. Div. 458.) The appellant is a grandniece of the deceased, George F. Gilman, and her demurrer is upon the grounds: (1) That causes of action have been improperly united, in that a cause of action against the administrators to recover personal property has been united with a cause of action against the heirs to recover real estate, and (2) that the complaint does not state facts sufficient to constitute a cause of action.

The appellant is an heir at law of the decedent, and the opinion on the other appeal handed down herewith is decisive that a cause of action is sufficiently stated against her.

One point not presented on that appeal or considered in that opinion is urged by counsel for the appellant here as indicating that causes of action have been improperly united. It is alleged that the decedent left "a large amount of real and personal property, consisting of houses and lands in the City and County of New York, in the State of New York, and in the City and Town of Bridgeport, in the State of Connecticut, and elsewhere, and of goods, chattels and money and securities for money in the States of New York and Connecticut and elsewhere." The appellant contends that inasmuch as the action involves both real and personal property it may require different places of trial even within this State. According to the allegations of the complaint the action will affect the title to real property situated in the county of New York and, therefore, notwithstanding the fact that some real prop-

erty is situated without the State the venue is properly laid in New York county. (Code Civ. Proc. § 982.) The action will also affect the title to personal property which it is alleged is situated within the county of New York. The complaint does not show whether the plaintiff or any of the parties reside in that county. It is claimed by the appellant that under section 984 of the Code of Civil Procedure the cause of action, so far as it affects personalty, must be tried in a county where some of the parties reside and that if none of them reside in the county of New York it cannot be tried there so far as the personalty is concerned. If this be so, it does not appear on the face of the complaint that none of the parties reside in the county of New York and, therefore, the question is not presented by the demurrer. Moreover, since the action will affect the title to real property the provisions of section 982 of the Code require its trial in a county where some part of the real property is situated. Section 984 relates to other actions than those specifically provided for in sections 982 and 983 of the Code. This being an action specifically provided for in section 982, it does not fall within the provisions of section 984 at all, even though none of the parties reside in the county where the real property is located. The other questions presented have been considered in said opinion which is decisive thereof.

It follows that the interlocutory judgment should be affirmed, with costs, but with leave to the appellant to answer upon payment of the costs of the appeal and of the demurrer.

VAN BRUNT, P. J., PATTERSON, O'BRIEN and McLAUGHLIN, JJ., concurred.

Judgment affirmed, with costs, with leave to appellant to answer on payment of costs of appeal and of demurrer.

UVALDE ASPHALT PAVING COMPANY, Respondent, v. THOMAS J. DUNN, Appellant.

*A reasonable doubt whether a case can be tried within two hours is a sufficient ground for not putting it on the short cause calendar.*

Rule 5 of the Rules for the Regulation of Trial Terms in the First District, authorizing the placing of cases upon the short cause calendar, where "it satisfactorily appears by affidavit and the pleadings that the trial of the action will not occupy more than two hours, and that no good reason exists why the same should not be promptly tried," contemplates that a case shall not be placed upon the short cause calendar unless it appears, with reasonable certainty, that the trial thereof will not occupy more than two hours, and where the justice, before whom the motion is made, entertains a "reasonable doubt" whether the action can be tried within that time, he should deny the motion.

APPEAL by the defendant, Thomas J. Dunn, from an order of the Supreme Court, made at the New York Trial Term and entered in the office of the clerk of the county of New York on the 20th day of November, 1902, placing the cause upon the short cause calendar.

*Jacob Marks*, for the appellant.

*Granville Whittlesey*, for the respondent.

LAUGHLIN, J.:

The plaintiff obtained a contract from the city of New York, through its department of highways, for paving the roadway of Eighth street from Broadway to McDougall street, including furnishing and setting new curbing and redressing and resetting old curbing. It sublet to the defendant that part of the work relating to new and old curbing, including the work of taking up "paving stone and doing all excavating that may be necessary for said curb setting." The action is brought for a breach of the defendant's contract to perform this work in such a manner as not to render the plaintiff liable for damages. Damages have been recovered against the plaintiff, for which it seeks to hold the defendant. The plaintiff alleges that the defendant had notice of the action brought against it, and that the same was defended at the request of the defendant. The defendant denies these allegations and disputes his

liability. If the defendant should not be bound by the judgment recovered against the plaintiff, all questions relating to the negligent construction of the work and the amount of damages will have to be litigated anew. Thus, although an action on contract, it may involve the trial of a question of negligence and of unliquidated damages. The moving affidavits indicate that the issue can be tried in two hours, but this is controverted by the opposing affidavits; and it is extremely doubtful whether the issues can be thus tried. The learned justice who granted the motion says in a memorandum opinion that there is "reasonable doubt" whether the action can be tried within two hours.

This court has frequently expressed its reluctance to interfere with the discretion of the trial courts in granting or denying motions of this character; but it is manifest that this case should not be placed on the short cause calendar. The rule (Rule 5 of the Rules for the Regulation of Trial Terms, First Judicial District) only authorizes the placing of cases on the short cause calendar where, upon the application, "it satisfactorily appears by affidavit and the pleadings that the trial of the action will not occupy more than two hours, and that no good reason exists why the same should not be promptly tried." Where there is *reasonable doubt* whether a case can be tried in two hours it cannot be said that "it satisfactorily appears" that the trial will not occupy more than two hours. In exercising the authority conferred by this rule consideration must be given to the congested condition of the Trial Term calendar and to the rights of the party opposing the motion. Other litigants should not be delayed in the trial of their cases by fruitless attempts to try issues as short causes which cannot be tried within the time limited by the rule. Moreover, the party opposing the motion should not unnecessarily be put to the trouble and expense of preparing for two trials, or subjected to any great risk of the cause being sent to the foot of the calendar and the trial of the issues thus delayed for a period of two years or more. This rule contemplates that it should appear with *reasonable certainty* that the trial of the case will not occupy more than two hours, and not that a case shall be ordered upon the short cause calendar, where there is *reasonable doubt* as to whether it can be tried in that time.

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The order should, therefore, be reversed, with ten dollars costs and disbursements, and motion denied, with ten dollars costs.

VAN BRUNT, P. J., PATTERSON, O'BRIEN and McLAUGHLIN, JJ., concurred.

Order reversed, with ten dollars costs and disbursements, and motion denied, with ten dollars costs.

ALFRED FASY and VIRGINIA FASY-WELLS, Respondents, v. INTERNATIONAL NAVIGATION COMPANY, Appellant.

*Bill of lading—when the burden of proof as to when a loss of part of the goods covered by the bill occurred, rests on the carrier issuing it—conditions limiting the carrier's liability.*

In an action brought by Alfred Fasy and his wife against the International Navigation Company to recover the value of a sealskin sack, it appeared that the plaintiffs delivered a trunk containing such sealskin sack to the agents of the defendant at Basle, Switzerland, for transportation to New York. The bill of lading provided that the trunk should be delivered at New York to "The International Navigation Co., New York, for disposal of Dr. Wells, Esq., Richmond Hill, Long Island, or to his or their assigns." On the arrival of the trunk in New York the defendant, without giving the consignee or the plaintiffs an opportunity to see or examine the trunk or take it in charge for the purpose of entry, sent it to the custom house and, after it had been released, forwarded the trunk to the plaintiffs at Richmond Hill through an express company chosen by it. When the trunk was opened the sealskin sack was found to be missing. *Held*, that, as the defendant had deprived the plaintiffs of their right to examine the trunk at the place of delivery designated in the contract, the burden of proof as to when the loss of the sack occurred was thereby shifted, and that the defendant was called upon to show whether or not the loss occurred while the trunk was in its actual custody;

That conditions in the bill of lading limiting the liability of the defendant could not be regarded as exempting the defendant from liability for negligence.

PATTERSON and McLAUGHLIN, JJ., dissented.

APPEAL by the defendant, the International Navigation Company, from a judgment of the Supreme Court in favor of the plaintiffs, entered in the office of the clerk of the county of New York on the 23d day of June, 1902, upon the verdict of a jury rendered by direction of the court, and also from an order entered in said clerk's

office on the 20th day of June, 1902, denying the defendant's motion for a new trial made upon the minutes.

April 26, 1899, the plaintiff Virginia Fasy-Wells, who is the wife of the plaintiff Alfred Fasy, delivered a trunk to the agents of the defendant at Basle, Switzerland, for transportation to New York. A bill of lading was issued in the usual form, whereby the defendant undertook to forward the trunk to Southampton, and there transship it to the steamship *Paris* of the defendant's line to be delivered at New York to "The International Navigation Co., New, York for disposal of Dr. Wells, Esq., Richmond Hill, Long Island or to his or their assigns."

The trunk was entered at the custom house and after its release was delivered to the plaintiff Virginia Fasy-Wells at Richmond Hill, L. I. Upon such delivery it was found that a sealskin sack which had been placed in the trunk was missing, and this action was brought to recover the value thereof.

*Norman B. Beecher*, for the appellant.

*Joseph P. Osborne*, for the respondents.

Judgment and order affirmed, with costs, on opinion of NASH, J.

VAN BRUNT, P. J., O'BRIEN and LAUGHLIN, JJ., concurred; PATTERSON and McLAUGHLIN, JJ., dissented.

The following is the opinion of NASH, J., delivered at the New York Trial Term :

NASH, J. :

The defendant's bill of lading acknowledging the receipt of the trunk is evidence of the fact that it was delivered to the defendant's agent at Basle. By its terms the defendant agreed to deliver the trunk of effects in good order and condition at the port of New York with "The International Navigation Co. New York, for disposal of Dr. Wells," Richmond Hill, L. I. The defendant was not required by its contract to deliver the trunk to Dr. Wells at Richmond Hill. It could have relieved itself of liability by the delivery of the trunk of effects to the consignee in New York in good order and condition, and upon tendering such delivery the question as to good order and condition, if raised by the plaintiffs,

would then have been determined, and if not, the plaintiffs would have been concluded. The defendant did not do this. Its agent, without giving to the consignee, or the plaintiff Mrs. Wells, an opportunity to see or examine the trunk, or take it in charge for the purpose of entry, sent it to the custom house, and after entry there and its release by brokers of its selection forwarded the trunk by an express company chosen by the defendant. The defendant thereby retained the entire control of the trunk to the exclusion of the plaintiff until it was finally delivered to her at Richmond Hill. The defendant in this manner made the express company it selected its agent for the purpose of the delivery of the trunk to the consignee, and while the act of delivery was entirely voluntary, not being required by the contract, it deprived the plaintiffs of the right which they had to examine the trunk of effects at the place of delivery provided in the contract. It is fair, I think, to hold that the burden of proof was thereby shifted, and that the defendant was called upon to show whether or not the loss occurred while the trunk was in its actual custody. The evidence also fairly discloses the fact that the sealskin sack was not in the trunk when delivered at the custom house; the entry and fees then amounted to only \$4.08, whereas the sack was subject to a duty of 35 per cent on its valuation of \$180, the excess above \$100, which it may be assumed would have been levied if the trunk had contained the sack. It seems that the conditions of the bill of lading limiting the liability of the defendant cannot be regarded as exempting the defendant from liabilities for negligence. (*The Kensington*, N. Y. L. J., Feb. 5, 1902.) The loss must have occurred through negligence of the defendant's servants or agents if the sack was taken from the trunk while in its custody.

Motion for a new trial denied, with ten dollars costs.



**Cases**  
**DETERMINED IN THE**  
**SECOND DEPARTMENT**  
**IN THE**  
**APPELLATE DIVISION,**  
**December, 1901.**

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IPPOLISTO CASTELLI, Respondent, *v.* HENRY J. TRAHAN and MODESTINO Russo, Defendants, Impleaded with DOMENICO AMEDEO and Others, Appellants.

*Foreclosure of a mechanic's lien — when a personal judgment is proper.*

A personal judgment cannot be granted in an action to foreclose a mechanic's lien unless the plaintiff succeeds in establishing a valid lien.

APPEAL by the defendants, Domenico Amedeo and others, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Kings on the 23d day of December, 1901, upon the report of a referee.

*Ernest P. Seelman* and *Antonio Madeo*, for the appellants.

*Henry M. Heymann*, for the respondent.

PER CURIAM :

This action was brought to foreclose certain mechanics' liens for work and labor performed by the plaintiff and his assignor. It was tried before a referee, and there was a conflict of evidence upon the issues presented by the pleadings, which the referee has resolved in favor of the plaintiff, judgment being entered in his behalf. We are of opinion that the findings of fact are supported by the evidence, and concur in the conclusions of law, in so far as they relate to the personal claim of the plaintiff.

It is, however, established by authority that in the absence of a

77	472
40 Mis	124

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valid lien there can be no personal judgment in actions of this character. (*Dudley v. Congregation, etc., of St. Francis*, 138 N. Y. 451, 458, and authority there cited; *McDonald v. Mayor*, 58 App. Div. 73, 75, and authorities there cited), and as the referee has found as a fact that the claim of plaintiff's assignor was not a valid lien, it follows that the personal judgment against the defendants cannot be supported in so far as it is founded upon the lien of Raffaele Giordano.

The judgment must be modified in accordance with this opinion, and as so modified affirmed, without costs of this appeal to either party.

All concurred.

Judgment modified in accordance with opinion per curiam, and as modified affirmed, without costs of this appeal to either party.

In the Matter of the Taxation, under the Act Relating to Taxable Transfers of Property, of the Estate of CHARLES MILLER, Deceased.

77	473
83	533
83	534
40 Mis	331

GERTRUDE B. MILLER, Appellant; THE COMPTROLLER OF THE STATE OF NEW YORK, Respondent.

*Transfer tax — an ante-nuptial transfer and a retransfer in trust held not to be subject thereto — the construction of the ante-nuptial transfer is not affected by a subsequent will.*

By an ante-nuptial agreement, bearing date April 7, 1898, Charles Miller assigned to Gertrude B. Tefft, his intended wife, 2,000 shares of the stock of a corporation. By an agreement entered into between Miller and Miss Tefft, bearing date April 8, 1898, Miss Tefft reassigned the stock to Miller upon trust "to invest and re-invest the same in the purchase of real or personal property, and to change the investments as he may in his discretion, subject to the approval of the said party of the first part (Miss Tefft), think most advantageous, \* \* \* and to receive, appropriate and apply to the mutual use of the parties to these presents the interest and income arising therefrom during the joint lives of said parties."

The agreement of April eighth further provided: "Upon the death of either of the parties hereto the trust hereby created shall terminate and come to an end; and in case the party of the first part should first die, leaving the party of the second part (Miller) surviving her, the said property hereinabove granted and assigned,

and the investments representing the same, shall thereupon become and be the absolute property of the party of the second part, freed from all trusts and conditions whatsoever; and in case the party of the second part should first die, leaving the party of the first part surviving him, then and in that case, the said property and the said investments representing the same, shall revert to the said party of the first part, and she hereby reserves the same in that event to herself in absolute ownership, free from all trusts and conditions whatsoever.

The contemplated marriage took place on April 8, 1898, subsequent to the execution of the instruments. Miller died January 19, 1901, leaving a will dated January 17, 1900, which contained the following provision: "*Second*: Whereas I have heretofore set apart and transferred to my wife Gertrude Benchley Miller two thousand (2,000) shares of the capital stock of the Phoenix Horse Shoe Company of Illinois of the par value of two hundred thousand dollars (\$200,000), which stock I now hold under a certain deed of trust executed by my said wife to use (*sic*), bearing date the 7th day of April, 1898, I do hereby reaffirm the said transfer and do give and bequeath all the right, title and interest I may have, if any, in and to the said two thousand (2,000) shares of stock and in and to all the property in which the same may stand invested under the said trust deed at the time of my death, to my said wife absolutely."

The surrogate decided, upon the documentary evidence alone, that the agreements of April seventh and eighth were contemporaneous, and were made in contemplation of the death of Miller, and determined that the transfer of the stock was subject to a transfer tax.

*Held*, that the decree should be reversed;

That it was incumbent upon the State to prove the facts justifying the imposition of the transfer tax;

That, as the transfers from Miller to Miss Tefft and from Miss Tefft to Miller bore different dates, the presumption was that they were separate and distinct instruments, executed on the days of their respective dates, and that, in the absence of any evidence to the contrary, the surrogate was not justified in finding that such agreements were contemporaneous and parts of one transaction;

That the ante-nuptial agreement of April 7, 1898, was based upon a valuable consideration, and operated to confer on Miss Tefft the absolute ownership of the stock;

That the transfer effected by such instrument was not subject to the transfer tax, and was not rendered subject thereto by the agreement of April 8, 1898;

That the will of Charles Miller, considered as an act or declaration of his, could not affect the construction of the ante-nuptial transfer.

APPEAL by Gertrude B. Miller from an order of the Surrogate's Court of the county of Dutchess, entered in said Surrogate's Court on the 27th day of March, 1902, fixing a transfer tax upon 2,000 shares of stock mentioned in the 2d clause of the will of the decedent.

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*Frederic R. Kellogg and Henry H. Van Cleef*, for the appellant.

*William Morgan Lee*, for the respondent.

GOODRICH, P. J. :

The surrogate of Dutchess county made an order adjudging that a transfer of stock in an Illinois corporation by the testator, Charles Miller, to Gertrude B. Tefft was made in contemplation of his death, and that the stock or its equivalent is subject to the payment of the tax imposed by section 220 of the Tax Law (Laws of 1896, chap. 908, as amd. by Laws of 1897, chap. 284), under the 3d subsection, reading: "3. When the transfer is of property made by a resident or by a nonresident, when such nonresident's property is within this State, by deed, grant, bargain, sale or gift made in contemplation of the death of the grantor, vendor or donor, or intended to take effect, in possession or enjoyment, at or after such death."

The facts out of which this controversy arises are practically undisputed. On April 7, 1893, Miller made an ante-nuptial written agreement, reciting his intended marriage with Miss Tefft and his desire to make pecuniary provision for her and providing that in consideration thereof he "doth assign, transfer, grant and set over and deliver at the time of the delivery hereof, unto the said party of the second part, two thousand (2,000) shares of the preferred capital stock of the Phoenix Horse Shoe Company of Illinois and the certificate therefor numbered thirteen (13)."

On April eighth Miller and Miss Tefft entered into another agreement stated to be in duplicate, wherein, "in consideration of the intended inter-marriage of the parties," Miss Tefft "doth assign, transfer, grant and set over unto" Miller "two thousand (2,000) shares of the preferred capital stock of the Phoenix Horse Shoe Company of Illinois and the certificate therefor numbered thirteen (13)," upon the trust, "to invest and re-invest the same in the purchase of real or personal property, and to change the investments as he may in his discretion, subject to the approval of the said party of the first part (Miss Tefft), think most advantageous, free from any limitations or restrictions prescribed by law relative to the kind of investments allowed for trust funds, and to receive, appropriate and apply to the mutual use of the parties to these presents the interest and income arising therefrom during the joint lives of said parties.

Upon the death of either of the parties hereto the trust hereby created shall terminate and come to an end; and in case the party of the first part should first die, leaving the party of the second part (Miller) surviving her, the said property hereinabove granted and assigned, and the investments representing the same, shall thereupon become and be the absolute property of the party of the second part, freed from all trusts and conditions whatsoever; and in case the party of the second part should first die, leaving the party of the first part surviving him, then and in that case, the said property and the said investments representing the same, shall revert to the said party of the first part, and she hereby reserves the same in that event to herself in absolute ownership, free from all trusts and conditions whatsoever. Said party of the second part, in consideration of the premises and of the sum of One Dollar to him in hand paid by the said party of the second\* part, the receipt of which is hereby acknowledged, does hereby acknowledge the delivery to him of the preferred stock and the certificate therefor within described, and does accept the same upon and subject to the trusts hereinbefore specified, and hereby agrees to hold, use, manage and account for the said property and the investments representing the same, subject to the terms, conditions and provisions hereinbefore recited."

The parties have stipulated in the record that Mr. Miller and Miss Tefft were married on April eighth, subsequently to the executions of said instruments; that Miller died on January 19, 1901, leaving a will dated January 17, 1900, which has been admitted to probate by the surrogate of the county of Dutchess.

The will contained the following provision: "*Second*: Whereas I have heretofore set apart and transferred to my wife Gertrude Benchley Miller two thousand (2,000) shares of the capital stock of the Phoenix Horse Shoe Company of Illinois of the par value of two hundred thousand dollars (\$200,000) which stock I now hold under a certain deed of trust executed by my said wife to use (*sic*), bearing date the 7th day of April, 1893, I do hereby reaffirm the said transfer and do give and bequeath all the right, title and interest I may have, if any, in and to the said two thousand (2,000) shares of stock and in and to all the property in which the same

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\* *Sic*.

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may stand invested under the said trust deed at the time of my death, to my said wife absolutely."

There is in the record also an affidavit by Elisha H. Miller, one of the sons of the testator and one of the executors of his will, and apparently considered a part of the evidence, in which he says: "The two thousand shares of the stock of the Phoenix Horseshoe Company mentioned in the second clause of the Will were transferred by my father to Gertrude B. Tefft by a deed of absolute assignment dated April 7th, 1893, in contemplation of his marriage with her. On the following day Gertrude B. Tefft conveyed the said shares to my father by a deed of trust dated April 8th, 1893." This comprises the entire evidence upon which the learned surrogate based the following findings:

"I. That the transfer by Charles Miller to Gertrude B. Tefft, made on or about April 8th, 1893, of two thousand (2,000) shares of the preferred stock of the Phoenix Horseshoe Company of the par value of \$100 per share was made in contemplation of the death of the said Charles Miller and was not intended to take effect in possession or enjoyment until at and after his death.

"II. That the said 2,000 shares of stock referred to valued at \$180,000 or its equivalent, is subject to a transfer tax of one per cent. amounting to \$1,800.00."

As there was no oral but only documentary evidence, we are in just as good a position to form an opinion as to the main point on which the decision of the appeal must rest as was the surrogate. He rested his decision absolutely and necessarily upon his finding that the agreements of April seventh and April eighth were contemporaneous and were made in contemplation of the death of Miller. If the instruments were not parts of the same transaction, and if the transfer of the stock to Miss Tefft on April seventh was a completed transaction, the reasons of the surrogate do not control the situation. In order to an intelligent discussion of the subject, I quote a portion of his opinion:

"No evidence as to the intent of the parties is presented except such as is contained in the agreements and in the will of Charles Miller. It is evident to me that the agreements were drawn with a view to the situation that has since arisen. The evidence of the second agreement being contemplated when the first was executed,

so far as the instruments themselves furnish, is their proximity of execution ; the transfer of precisely the same property for the same consideration. It may be reasonably inferred from the character of the property that Mr. Miller would be disinclined to divest himself of all authority over it and not only lose the value of its influence to him as a stockholder, but make it possible for it to pass into the hands of those who might antagonize his interests. Irrespective of this evidence and inference I am unable to supply any reason for the execution of the second agreement before the consideration for the first had become operative, if the second was not in contemplation when the first was executed. Certainly the lapse of a few hours between their execution, if such is the fact, will not suffice to defeat the legislative intent to apply a tax to transfers of personal property made in contemplation of death or intended to take effect in possession or enjoyment at or after such death. The provision in the will indicates that the testator did not intend to divest himself of the rights of ownership, possession and enjoyment which must pass by a transfer to take it without the scope of the act."

His first proposition, and this seems to me to be the crucial point of the whole matter, is that the agreements and transactions of April seventh and April eighth were contemporaneous and parts of one transaction, and were so intended by Miller. Of this he correctly says there is no evidence except the agreements themselves and the will. This being true, I think the learned surrogate has given rein to his imagination and has permitted surmise and suspicion to take the place of presumption and legal deduction. As the instruments were executed on different days, the presumption is that they were separate and distinct. (See *Dechert v. Municipal Electric Light Co.*, 9 App. Div. 573.) The instrument of April eighth does not even refer to the transfer of April seventh and in no sense is conditioned upon it. It must be assumed, in the absence of oral testimony, that the agreement of April seventh was executed and the stock delivered to Miss Tefft on the day of its date, and it appears by the affidavit of the executor that the agreement of April eighth was not executed until the next day after the agreement of April seventh. If this is so, the transaction was a completed transaction of the day of its date, April seventh, and Miss Tefft became the absolute owner of the stock by assignment and delivery. It would

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not even have been defeated by the death of Miller before the marriage had occurred. (*Smith v. Allen*, 5 Allen, 454.)

It is true that it has been held that where two instruments are intended to embody a contract between the parties, they must be read and construed together, and the fact that they bear different dates is not material if the contract is not carried into effect until both are executed. Respondent cites *Knowles v. Toone* (96 N. Y. 534). In that case a note indorsed by a married woman was presented to the plaintiff for purchase. He refused to purchase until she had answered certain questions. Her written answer was dated three days after the date of the note, and thereupon the plaintiff purchased the note. The court held that the note had no inception until the time of the purchase, and, as this occurred after her written answer, the note and the answer were part of one transaction. But in the present case the transaction of April seventh was a completed sale and transfer of the stock accompanied by delivery of the certificate on that day.

The State has the burden of proving the facts under which the transfer tax may be imposed. In *Matter of Enston* (113 N. Y. 174, 177, 178) it was said, Judge ANDREWS writing: "The tax imposed by this act is not a common burden upon all the property or upon the People within the State. It is not a general, but a special tax, reaching only to special cases and affecting only a special class of persons. The executors in this case do not, therefore, in any proper sense, claim exemption from a general tax or a common burden. Their claim is that there is no law which imposes such a tax upon the property in their hands as executors. If they were seeking to escape from general taxation, or to be exempted from a common burden imposed upon the People of the State generally, then the authorities cited by the learned counsel for the People, to the effect that an exemption thus claimed must be clearly made out, would be applicable. But the executors come into court claiming that the special taxation provided for in the law of 1885 \* is not applicable to them, or the property which they represent. In such a case they have the right, both in reason and in justice, to claim that *they shall be clearly brought within the terms of the law before they shall be subjected to its burdens. It is a well established*

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\* Laws of 1885, chap. 488.—[REF.]



rule that a citizen cannot be subjected to special burdens without the clear warrant of the law. The following authorities furnish the true rule applicable to such a case : Cooley on Taxation (2d ed. 275); *United States v. Wigglesworth* \* (2 Story, 373); *Powers v. Barney* (5 Blatch. 203); *United States v. Watts* (1 Bond, 583); *Doe v. Snaith* (8 Bing. 152); *Green v. Holloway* † (101 Mass. 248).” This decision was cited and reannounced in *Matter of Vassar* (127 N. Y. 1, 12), where it was said: “And the rule is that special tax laws are to be construed strictly against the government and favorable to the taxpayer, that a citizen cannot be subjected to special burdens without clear warrant of law.”

So, also, in *Matter of Thorne* (44 App. Div. 8), this court, Mr. Justice HATCH writing, said (p. 10): “The right to impose the tax must rest upon evidence sufficient in probative force to bring it within the statute, and must establish a case from which the law clearly authorized its imposition.” It is hardly necessary to repeat that with the exception of the two instruments and the will there is no evidence upon which to base a finding that the two agreements were contemporaneous or one transaction.

Another principle is well established. Where any document bearing a date has been proved, the presumption is that it was made on the day on which it bears date. (Chase’s Steph. Dig. Ev. art. 85; 1 Greenl. Ev. [15th ed.] § 38, note b.) This presumption not having been overcome by any evidence on the part of the State, it becomes conclusive that the two agreements were executed on the days of their date respectively. Then there is no evidence to justify a finding that they were contemporaneous and intended to be part and parcel of one transaction. It follows that the transaction of April seventh, which included the delivery of the certificate of stock to Miss Tefft, was complete in itself and that she became the absolute owner of the stock on that day. For an agreement of marriage is a valid consideration for such an agreement and transaction. The rule is well stated in 6 American and English Encyclopædia of Law (2d ed. p. 724): “Marriage, in contemplation of law, is not only a valuable consideration for a contract or conveyance between the parties to it, but is a consideration of the highest value, and from motives of the soundest public policy is upheld with a strong reso-

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\* *United States v. Wigglesworth*.

† *Green v. Holway*.

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lution. The husband and wife, parties to such a conveyance, are, therefore, deemed, in the highest sense, purchasers for a valuable consideration. \* \* \* It is upon this principle that ante-nuptial settlements are upheld." (See, also, *Johnston v. Spicer*, 107 N. Y. 185; *Magniac v. Thompson*, 7 Pet. 348.)

I do not consider that the statute has reference to transfers made upon a valuable consideration, but that it relates merely to voluntary transfers without consideration, for the tax is not one upon property, but upon the right of succession. (*Matter of Dows*, 167 N. Y. 227.) A payment of an obligation dependent upon a valuable consideration is not a succession in any sense. In this case the transfer was made eight years before the death of Miller. There is no evidence that Miller was in ill-health or that there was any condition of affairs to suggest or invite the contemplation of death. It was rather made in contemplation of life and for a definite purpose, that of providing a means of mutual support for himself and his intended wife. There is not a suggestion of any intent to evade the provisions of the Transfer Tax Act unless it shall be decided that the two instruments were contemporaneous, and that I have already discussed. The income was to be devoted to the mutual support of husband and wife. Miss Tefft had an immediate and undivided interest in joinder with Miller to every dollar of income of the trust fund and was the absolute owner of the principal, subject to the trust. In other words, being absolute owner by the agreement of April seventh by the agreement of April eighth she continued vested with the present, although not with the exclusive right of enjoyment of the stock and its income. This is not within the purview of the Transfer Tax Act.

But the State contends and the surrogate holds that the instrument of April seventh is illuminated and is to be interpreted by the 2d clause in the will of the testator above cited. To give the will any such effect would be to violate the settled canon of law that no act or declaration of a grantor subsequent to his transfer of property can affect the rights of the grantee. A declaration of a grantor to be effective must be made while he is owner and in possession of the property, and the act must precede or be contemporaneous with the principal act. (1 Greenl. Ev. § 110; Chase's Steph. Dig. Ev. art. 3.)

Neither can it be said that the trust agreement of April eighth is contemporaneous with the agreement of April seventh. The title of Miss Tefft to the stock was complete and absolute on April seventh. The instrument was accompanied by a delivery of the certificate of stock. The affidavit of Elisha H. Miller shows that the agreement of April eighth was not executed until the next day. We must not lose sight of the fact that we are searching for the intention, not of Miss Tefft, but of Miller in the transaction. If there was nothing more than the transfer of April seventh to interpret could it be even suggested that the transfer was made in contemplation of the death of Miller, or that it was not founded upon a valuable consideration and was absolute and completed? Probably death is the last thing in the mind of an expectant bridegroom. There is only the instrument of April eighth which casts a shadow of a doubt upon the completeness of the transaction of April seventh, and that, in my opinion, was not contemporaneous with the agreement of April seventh and was not intended to be. There is no evidence from which any such intent can be inferred.

Miss Tefft, being then the absolute owner of the stock, could make such pledge, division or disposition of it and its income as she saw fit, without regard to the Transfer Tax Act. It is immaterial what was her intention unless there is evidence sufficient to support a finding that the two agreements were parts of one transaction and were made in contemplation of Miller's death and to defeat the operation of the statute. The death of Miller was but an incident in the matter contained in the agreement of April eighth. It was not of its substance. It merely fixed a date when any interest of Miller in the income was to cease. He had no interest in the principal unless he survived Miss Tefft. There was no transfer to him of the absolute title of the stock in the agreement of April eighth. True the legal title of the stock was transferred to Miller, but it was on a specified trust, and no disposition of it could be made by him except "subject to the approval" of Miss Tefft.

By the agreement of April eighth Miss Tefft devoted the income to the "mutual use" of herself and her intended husband. Being absolute owner she had the right to do so. But this is not to say that the agreement affords any evidence that Miller transferred the stock to her on April seventh in contemplation of his death. The

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transfer of April seventh to her was not intended "to take effect in possession or enjoyment at or after" his death. Both possession and enjoyment were transferred to her absolutely *in presenti* by the language of the transfer of April seventh, and were not postponed until, or in any sense dependent upon, his death.

In *Matter of Brandreth* (169 N. Y. 437) it was said by the court, Judge CULLEN writing, that the Brandreth "transfer became subject to taxation, if at all, when it was made, and no subsequent transfers made by the parties could relieve it from such liability." I think the converse of the proposition is equally true, and that the transfer to Miss Tefft, being made on April seventh, for a valuable consideration and absolutely, the subsequent agreement of Miller with Miss Tefft does not make the transfer of April seventh subject to the transfer tax.

The respondent's counsel relies upon three cases, *Matter of Green* (153 N. Y. 223); *Matter of Bostwick* (160 id. 489), and *Matter of Brandreth* (169 id. 437). They do not apply to the case at bar. In the *Green* case the property was delivered by the owner to a trustee under an instrument purporting to assign it to the trustee to collect the income and apply it to the sole use of the grantor during his life, and after the grantor's death to distribute it among remaindermen. The court said, through Judge O'BRIEN: "The death of the donor was the event which made the transfer complete and effective, and secured to the nieces the possession and enjoyment of the property." In the case at bar the transfer by Miller to Miss Tefft was absolute under the agreement of April seventh, and was not dependent on the agreement of April eighth.

So in the *Bostwick* case the trust deed was the act of the testator, and he was therein authorized to revest himself with the ownership of the property and to dispose of it as effectually as he might previously have done without any right in the grantee to control his acts. Thus also in the *Brandreth* case, the grantor made a gift of stock to his four daughters, and transferred it to them upon the condition that he should receive all the dividends during his lifetime, with the right to vote on the stock as though no transfer had been made.

In all these cases the grant was made by the testator; the act was exclusively his. There was no previous and absolute transfer of

the property to the grantee and no transfer, except by the instruments which reserved rights to him inconsistent with the idea of ownership until the death of the grantor. In the case at bar the transfer of the stock to Miss Tefft was complete and absolute, without any reservation whatever, on April seventh. Whatever occurred thereafter was not the sole act of Miller. The transfer of April eighth was by Miss Tefft to Miller, and not by Miller to her.

I cannot escape the conclusion that the learned surrogate was in error in holding, on the sole evidence of the two agreements and the will, that the two agreements were contemporaneous and parts of one transaction, and were made in contemplation of the death of Miller and to avoid the imposition of a transfer tax.

It follows that his decree should be reversed.

All concurred.

Decree of the Surrogate's Court of Dutchess county reversed, with ten dollars costs and disbursements.

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H. VAN RENSSELAER KENNEDY, Appellant, v. THE MINEOLA, HEMPSTEAD AND FREEPORT TRACTION COMPANY, Respondent.

*Railroad — action to restrain the construction of its road by an abutting owner — description in a deed — proof as to the title to the fee of a highway.*

Upon the trial of an action brought by the owner of property abutting upon the east side of Freeport road in the town of Hempstead, Nassau county, to enjoin the construction and maintenance of a street surface railroad upon the easterly half of the highway in front of his premises, it appeared that the plaintiff's title was derived under a deed executed in 1893 by Laura A. Duryea and her husband. This deed contained the following description: "Beginning at a point on the North Easterly side of the Babylon Turnpike (so called) at a point intersecting the land of J. Tompkins;" thence by various courses and distances "until it comes to the North easterly side of the Babylon Turnpike (so called); thence along said Turnpike North forty-five degrees, forty-one minutes West one thousand one hundred and fifty-nine feet; thence along said Turnpike North forty-six degrees, forty-nine minutes West one hundred and thirty and three tenths feet; thence still along said Turnpike North fifty-four degrees three minutes West three hundred and sixty-two and three tenths feet to the point or place of beginning. Containing within said bounds twenty-three 3612/10000 acres of land be the same more or less. Together with all the rights of the Grantor in and to said Babylon Turnpike," etc.

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Mrs. Duryea's title was derived under deeds from Joseph S. Morrell and Joseph E. Tompkins.

The Morrell deed, which was executed in 1873, described the land as "lying on the easterly side of the Highway" and bounded "Westerly by said Turnpike Road." It also described the premises as follows: "Beginning at the *Southwestern corner thereof on the easterly side of the Highway* formerly known as the South Oyster Bay Turnpike Road adjoining land of Joseph E. Tompkins and at a locust stake driven in the ground, and running thence along said Highway South fifty-five degrees and twenty-five minutes East three hundred and twenty feet and three tenths of a foot; thence still along said highway South forty-seven degrees and forty-five minutes East, one hundred and thirty feet and three tenths of a foot; thence still along said highway," etc.

The Tompkins deed, which was executed in 1874, described the premises as follows: "All that certain piece or parcel of land situated near the Village of Hempstead and in the Town of Hempstead aforesaid and on the *Northerly side of the old Babylon Turnpike*, and bounded as follows, viz.: Beginning at a locust stake and running along the *Northerly side of the Babylon Turnpike*," etc.

It was not shown that Mrs. Duryea's grantors ever had any title to the highway or any reserved right therein, but it appeared that the amount of land included in the description, according to lines and courses, contained in the deed from Mrs. Duryea to the plaintiff corresponded with the amount stated in the deed, while if the eastern half of the highway was included, the acreage would exceed that named in the deed by one and fourteen one-hundredths acres.

*Held*, that neither the deeds to Mrs. Duryea nor the deed from the latter to the plaintiff conveyed the easterly half of the highway, and that the complaint was properly dismissed.

APPEAL by the plaintiff, H. Van Rensselaer Kennedy, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of Nassau on the 24th day of April, 1902, upon the decision of the court, rendered after a trial at the Nassau Special Term, dismissing the complaint upon the merits.

*F. H. Van Vechten*, for the appellant.

*Augustus Van Wyck* [*James A. MacElhinny* with him on the brief], for the respondent.

GOODRICH, P. J.:

The plaintiff's action is to enjoin the defendant, a street surface railroad corporation, from constructing and maintaining a railroad in front of his property on the east side of Freeport road in the town of Hempstead, Nassau county, and from interfering with him

in removing the road constructed by the defendant; to recover damages occasioned to the plaintiff by the construction of the railroad, and also to have the construction of the railroad declared illegal and its maintenance a nuisance inflicting special injury and damage upon him.

The plaintiff is the owner of a tract of land on the easterly side of the highway, containing about twenty-three and thirty-six one-hundredth acres of land, more or less, with a frontage upon the road of about sixteen hundred and fifty-one feet. He also claims the ownership of the fee of the easterly half of the highway in front of his premises. Upon this part of the highway the defendant was constructing the street railroad which the plaintiff seeks to enjoin.

Plaintiff's title is under a deed executed in 1893 by Laura A. Duryea and her husband, containing the following description :

" Beginning at a point *on the North Easterly side of the Babylon Turnpike (so called) at a point intersecting the land of J. Tompkins*, thence North thirty-five degrees, thirty minutes East three hundred and fourteen and eight tenths feet along land of said Tompkins until it comes to the land of J. K. Boyd, deceased, thence North seventy-four degrees, twenty-six minutes East, six hundred and ninety-five and seven tenths feet along said Boyd's land until it comes to the land of William Powell; thence along the land of William Powell South twenty-four degrees, forty-eight minutes East, five hundred and eighty-seven and seven tenths feet; thence along the land of said Powell South twenty-two degrees, thirty-two minutes East one hundred and eighty-two and five tenths feet; thence still along said Powell's land South thirty degrees, four minutes East, six hundred and fifty-four and three tenths feet until it comes to the land of H. Duryea; thence along said Duryea's land South forty-four degrees fifteen minutes West, three hundred and ninety-four and six tenths feet *until it comes to the North easterly side of the Babylon Turnpike (so called); thence along said Turnpike* North forty-five degrees, forty-one minutes West one thousand one hundred and fifty-nine feet; *thence along said Turnpike* North forty-six degrees, forty-nine minutes West one hundred and thirty and three tenths feet; *thence still along said Turnpike* North fifty-four degrees three minutes West three hundred and sixty-two and

three tenths feet to the point or place of beginning. Containing within said bounds twenty-three  $3612 \div 10000$  acres of land be the same more or less. Together with all the rights of the Grantor in and to said Babylon Turnpike," etc.

Mrs. Duryea's title was under two deeds, one from Joseph S. Morrell, dated April, 1873, wherein the land was described as "*lying on the easterly side of the Highway*," and bounded "Northerly by land now or formerly belonging to Townsend B. Pettit; Easterly and Southerly by land formerly belonging to James Powell and Westerly by said Turnpike Road and as containing within said bounds twenty-eight acres more or less. Which said farm or tract according to a recent survey thereof made by James J. Matthews, is bounded and described as follows, to wit:

"Beginning at the *Southwesterly corner thereof on the easterly side of the Highway* formerly known as the South Oyster Bay Turnpike Road adjoining land of Joseph E. Tompkins and at a locust stake driven in the ground, and running thence along said Highway South fifty-five degrees and twenty-five minutes East three hundred and twenty feet and three tenths of a foot; thence still along said highway South forty-seven degrees and forty-five minutes East, one hundred and thirty feet and three tenths of a foot; thence still along said highway South forty-six degrees, and forty-one minutes East one thousand one hundred and fifty-seven feet to land of Stewart S. Haff, thence along said land North seventy-one degrees, and thirty-four minutes East, three hundred and ninety feet and seven tenths of a foot to land of William Powell; thence along said Powell's land North thirty-one degrees, and thirty-six minutes West, six hundred and thirty-four feet and eight tenths of a foot; thence still along said land North twenty-nine degrees, and thirty-eight minutes West, two hundred and eight feet and four tenths of a foot; thence still along said land North twenty-three degrees, and twenty-one minutes West, one hundred and eighty-two feet, and four tenths of a foot; thence still along said land North twenty-five degrees and forty-four minutes West, five hundred and eighty-seven and one-half feet to land of Nicholas Degroot; thence along said land and land of Joseph E. Tompkins South seventy-three degrees and twenty-nine minutes West, eight hundred and twenty-eight feet and eight tenths of a foot; thence along said land of said Joseph E. Tompkins, South



four degrees and forty-two minutes West two hundred and forty-six and one-half feet to the highway aforesaid at the point of Beginning.”

The other deed was from Joseph E. Tompkins to Mrs. Duryea, dated May 25, 1874, and contained the following: “All that certain piece or parcel of land situated near the Village of Hempstead and in the Town of Hempstead aforesaid *and on the Northerly side of the old Babylon Turnpike*, and bounded as follows, viz.: Beginning at a locust stake and running *along the Northerly side of the Babylon Turnpike* as aforesaid North fifty-five degrees and twenty-five minutes, West forty-one and seven tenths feet to land of said Joseph E. Tompkins; thence along the said Joseph E. Tompkin’s land North thirty-four degrees and thirty-five minutes, East seventy-one and six tenths feet to land of the aforesaid Laura D. Duryea; thence along the said Laura D. Duryea’s land South four degrees and forty-two minutes West eighty-two and eight tenths feet to the place of beginning. Containing One thousand four hundred and ninety-two and eight tenths square feet.”

I have italicized the portions of the descriptions which, in my view, must control our decision.

The plaintiff contends that under these deeds his grantor, Mrs. Duryea, was the owner of the fee of the easterly half of the highway and that under the description of her deed to him, especially under the clause, “Together with all the rights of the Grantor (that is, Mrs. Duryea) in and to said Babylon Turnpike,” he is the owner of the fee of the easterly half of the highway, and the validity of this claim is the question involved in this appeal.

The court at Special Term decided that while the plaintiff was owner of the property east of the highway he was “not the owner of the fee of that part of the highway known as the Freeport road, or Greenwich street, which lies easterly of the centre line of said highway in front of the property owned by him,” and dismissed the complaint, saying: “The action being founded upon an alleged trespass upon real property of the plaintiff it follows that the complaint must be dismissed upon the merits.”

In *Kings County Fire Ins. Co. v. Stevens* (87 N. Y. 287) there was a deed conveying land on the “southerly side of the Wallabout bridge road.” After running certain courses and distances the line ran “five hundred and ninety-four feet to the Wallabout bridge

road," and from thence, "along said road, twelve hundred and twenty feet to the place of beginning." The court said (pp. 291, 292): "It is generally conceded that a grantor of land abutting on a highway may reserve the highway from his grant. But the presumption in every case is, that the grantor did not intend to retain the highway, and such reservation will not be adjudged, except when it clearly appears from the language of the conveyance that such reservation was intended. But what language will be sufficient to exhibit such intent, is the point of difficulty, upon which courts have differed. \* \* \* In the case before us the starting point of the description is on the southerly side of the Wallabout bridge road, and the exact point of beginning is fixed by the reference to the lands of Skillman. The other lines are described by courses and distances, and the third course gives the length of that line in feet, to the road, which we think fairly imports that the measurement is to the side of the road, and the fourth course is along the road, etc., to the place of beginning. We think the road-bed was excluded by the terms of the description, within the cases of *Jackson v. Hathaway* (15 Johns. 447); *English v. Brennan* (60 N. Y. 609); *White's Bank of Buffalo v. Nichols* (64 id. 65)."

In the case last cited it was said (p. 70): "Whether a grant of lands bounded by a street, highway or running stream, extends to the center of such street, highway or stream, or is limited to the exterior line or margin of the same, depends upon the intent of the parties to the grant as manifested by its terms, so that the question as to the true boundary is, in all cases, one of interpretation of the deed or grant." The deed under which title was claimed described the property as beginning on the northwesterly line of a street, intersecting the northeasterly line of another street, and thence along the line of Carolina street to the place of beginning. The court said (pp. 71, 72): "Although the highway is in one sense a monument, it is regarded as a line, and the center of the highway in such case is regarded as the true boundary indicated, as is the case when a tree, stone or other similar object is designated as a monument; the center, in the absence of any other indication, is regarded as giving the true boundary or limit of the grant. (*Berridge v. Ward*, 10 C. B. [N. S.] 400; *Wallace v. Fee*, 50 N. Y. 694; *Perrin v. N. Y. C. R. R. Co.*, 36 id. 120; *Bis-*

*sell v. The Same*,\* 23 id. 61; *Banks v. Ogden*, 2 Wall. 57.) But when the words clearly indicate an intention to exclude from the operation of the grant the soil of the highway, it is equally well settled that it does not pass, and the grantor retains the title, subject only to any easement which may exist in the public or in the grantee of the adjacent lands. (*Marquis of Salisbury v. G. N. Railway Co.*, 5 C. B. [N. S.], 174; *Jackson v. Hathaway*, 15 J. R. 447; *Smith v. Slocomb*, 9 Gray, 36; *Hoboken Land and Improvement Co. v. Kerrigan*, 31 N. J. Law Rep. 16.) The grant under which the defendant claims title, describes the granted premises as commencing at the intersection of the exterior lines of two streets, of which Garden street is one, and so as necessarily to exclude the soil of the street. The point thus established is as controlling as any monument would have been, and must control the other parts of the description; all the lines of the granted premises must conform to the starting point thus designated, so that while but for this designation of the commencement of the survey or boundary, the lines along Garden street and Carolina street might, within the general principles before referred to, be carried to the center of those streets respectively, they are necessarily confined to the exterior lines of the streets, so as to connect at this starting point. The precise point was decided by this court. (*English v. Brennan*, 60 N. Y. [Mem.] 609.)"

Applying these authorities to the case at bar, we find that the description of the plaintiff's deed specifies a definite point from which the lines of the plot are run. It is a point on the northeasterly side of the turnpike "at a point intersecting (*sic*) the land" of Tompkins. From that point the description proceeds by courses and distances "until it (the line) comes to the North easterly side of the Babylon Turnpike," then in three courses, each time stated to be "thence along said Turnpike," "to the point or place of beginning," that is, the point already specified on the northeasterly side of the turnpike. If the description had used the words "along the northeasterly side of the turnpike," it is clear that the highway would have been excluded. But it seems to me clear that, under the decisions cited, the language of the description in the plaintiff's deed excludes the idea that there was any intent to include the highway.

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\* *Bissell v. N. Y. C. R. R. Co.*

The only doubt that arises in my mind is occasioned by the use of the words "Together with all the rights of the Grantor (Mrs. Duryea) in and to said Babylon Turnpike." This necessitates a reference to the deeds to Mrs. Duryea, in order to see whether she had any right or interest in the highway.

In the deed from Mrs. Duryea to the plaintiff the description is of a tract on the easterly side of the highway "Beginning at a point on the North Easterly side" of the turnpike, "at a point intersecting (*sic*) the land of J. Tompkins," and running by courses and distances until, by a line of specified length, "it comes to the North easterly side" of the turnpike.

The beginning of the description in the Morrell deed to Mrs. Duryea is more precise. It reads "on the easterly side of the Highway \* \* \* and at a locust stake driven in the ground," thence running "along said Highway" and returning a specified number of feet "to the highway aforesaid at the point of Beginning." The length of the front of the premises along the highway in this deed is stated to be 1,607 feet.

The second deed to Mrs. Duryea, that is, the deed from Tompkins, also describes the property as being on the northerly side of the highway, "*Beginning at a locust stake* and running along the Northerly side of the Babylon Turnpike \* \* \* forty-one and seven tenths feet," etc., returning a given number of feet "to the place of beginning."

Thus in each of the deeds to Mrs. Duryea, the grantor of the plaintiff, there is a fixed and definite point marked by a locust stake on the easterly or northerly side of the highway as a monument, at which the description commences and to which it returns. The use of this locust stake as a monument, in connection with the other words of the description above quoted, would seem to manifest the intention of the grantors that such stake and not the center of the highway should be the monument of the description (See *White's Bank of Buffalo v. Nichols, supra*), and thus to exclude the highway from the land conveyed by such deeds.

There are no previous deeds in evidence. It is not shown that either Morrell or Tompkins, Mrs. Duryea's grantors, ever had any title to the highway or any reserved right therein. The mere recital of the reservation of rights cannot create rights which are

not proven to exist. It was incumbent on the plaintiff to prove, by going back even to the original patentee or donee, that at some time some one of his predecessors had title to the land under the highway. (*Miller v. Long Island R. R. Co.*, 71 N. Y. 380.) In the present case the plaintiff has failed to prove that his grantor or any predecessor in title ever had any rights in the highway.

In addition to this, as shown in the calculation set out in the respondent's brief, the accuracy of which is not challenged in the appellant's answering brief, the amount of land included in the description, according to lines and courses, is twenty-three and thirty-five one-hundredths acres, which is the amount of land stated to be conveyed in the latter part of the description in the plaintiff's deed. This area excludes the highway. The inclusion of the highway would add an acreage of one and fourteen one-hundredths, making in all twenty-four and forty-nine one-hundredths acres, and this exceeds the amount named in the deed. This method of referring by way of explanation to the quantity of land called for by the courses and distances named in a deed was used by the court in *Higinbotham v. Stoddard* (72 N. Y. 94), referred to in *Watson v. City of New York* (67 App. Div. 573), where the court, Mr. Justice HATCH writing, said (p. 580): "Where a specific quantity of land is located by precise measurements, such measurements may be laid hold of as evidencing the intent of the parties, and will be controlling of the center of the street as a monument, when it appears that the quantity of the land within such boundary evidently answers to the intention of the parties."

There is no evidence, therefore, upon which to sustain the contention of the plaintiff that his grantor, Mrs. Duryea, was or that he is the owner of the fee of the easterly half of the highway.

As an abutter, the plaintiff is not entitled to an injunction restraining the construction of a railroad authorized by the State. (*Fobes v. R., W. & O. R. R. Co.*, 121 N. Y. 505; *Case v. County of Cayuga*, 88 Hun, 59; *Fries v. N. Y. & Harlem R. R. Co.*, 169 N. Y. 270.) In the last case it was said (pp. 276, 277): "The law is well settled in this State that where the property of an abutting owner is damaged, or even his easements interfered with in consequence of the work of an improvement in a public street conducted under a lawful authority, he is without remedy or redress, even

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though no provision for compensation is made in the statute. Whatever detriment the improvement may be to the abutter in such cases, is held to be *damnum absque injuria*." (Citing cases.)

It follows that the plaintiff has not established by evidence any title to or possession of the easterly half of the highway and is not entitled to an injunction or to the relief demanded.

The judgment should be affirmed.

All concurred.

Judgment affirmed, with costs.

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FRANCIS F. MONTENES, Respondent, v. METROPOLITAN STREET RAILWAY COMPANY, Appellant.

*Judicial notice as to the time of sunrise and sunset.*

The court will take judicial notice of the time of the rising or setting of the sun on any given day, and may, where such question is material, consult the almanac, not strictly as evidence, but for the purpose of refreshing the memory of the court and jury.

APPEAL by the defendant, the Metropolitan Street Railway Company, from a judgment of the Municipal Court of the city of New York, borough of Brooklyn, in favor of the plaintiff, entered on the 25th day of February, 1902, upon the decision of the court awarding the plaintiff \$225 damages.

*G. Glenn Worden and Henry A. Robinson*, for the appellant.

*K. C. McDonald and M. V. McDonald*, for the respondent.

WILLARD BARTLETT, J. :

This action was brought to recover damages for injuries sustained by the plaintiff's cab in a collision with one of the trolley cars of the defendant at the intersection of Fifty-eighth street and Madison avenue. The cab was proceeding westwardly through Fifty-eighth street at the rate of eight miles an hour, and the car was running northward through Madison avenue. The driver of the cab testified that when he got to the crossing of Madison avenue and Fifty-eighth street he looked up and down the track and saw

no car and heard no bell; that after that he knew nothing until he was knocked down; that he had then passed the first rail of the defendant's track; and that the next he knew was that he was picked up unconscious. The same witness further testified: "Q. Now, as I understand, when you were approaching Madison Avenue, as you were approaching the easterly crosswalk — that is the crosswalk on the east side of the avenue, running from the south side of 58th Street to the north side — as you were approaching that crosswalk and while on 58th Street you looked up and down the avenue for cars? A. I did. \* \* \* Q. So that you had an unobstructed clear view of the avenue, north and south? A. Yes. Q. After doing that you proceeded on across the avenue? A. I did. Q. And the next thing you knew was when the crash came, when the car struck your coach? A. Yes. Q. Your knowledge of the fact that the car struck the rear wheel, as you testified, is derived from having seen the coach afterwards? A. Yes. Q. You did not see the car actually strike it? A. No, sir. Q. You did not know that the car was near you or going to strike you until you felt the crash? A. No, sir. \* \* \* *By the Court:* Q. Were you driving eight miles an hour when you were driving over the track? A. At that rate."

The accident occurred at about five o'clock in the afternoon of May 26, 1901. The driver stated that it had been raining during the day, but that he did not notice whether it was raining at the time of the collision. When asked whether it was not perfectly light at the time, he answered, "Well, it was getting dark;" but when his attention was called to the fact that it was not likely to be getting dark at that season of the year at five o'clock, he characterized the condition of the atmosphere by the words, "Well, misty."

There was no one on the seat with the driver, nor was there any projection from the carriage to prevent him from seeing up and down Madison avenue. He swore distinctly that he had an unobstructed clear view of the avenue north and south; and notwithstanding this fact that he saw no car and did not know of the presence of any until he felt the crash of the collision.

I have stated all the evidence in the case which bears upon the conduct of the plaintiff's driver, and it seems to me that it fails to establish his freedom from negligence contributing to the accident.

Under the circumstances, it is incredible that he should really have exercised his power of vision in looking up and down Madison avenue and have failed to see the car which struck his cab. As we said in *Landrigan v. Brooklyn Heights R. R. Co.* (23 App. Div. 43): "Under the circumstances, as he narrates them, it is impossible to avoid the conclusion that if he had looked up the unobstructed street, to the extent and with the vigilance demanded by the exercise of ordinary prudence, he would certainly have perceived the car with which he collided a moment later." It is plain enough that he would have seen the car if he had looked with any vigilance whatever.

The statement of the witness that it was "misty" at the time of the collision is not enough of itself to warrant the inference that his view was obstructed by haze or fog. In the first place he did not say that it was. The existence of mist was not suggested until the questions of counsel had made it manifest that the witness had seriously erred in saying that it was growing dark at five o'clock on the twenty-sixth of May in the city of New York. The courts will take judicial notice of the time of the rising or setting of the sun on any given day, and may consult the almanac where such question is material, not strictly as evidence, but for the purpose of refreshing the memory of the court and jury. (*State v. Morris*, 47 Conn. 179; *Case v. Perew*, 46 Hun, 57; *Hunter v. N. Y., O. & W. R. R. Co.*, 116 N. Y. 615, 622.) The almanac contained in the official manual published by the Secretary of State for the use of the Legislature shows that in New York city on the 26th of May, 1901, the sun set at twenty minutes past seven; so that the collision must have occurred more than two hours before sunset. In the absence of distinct evidence that peculiar weather conditions prevailed at that time tending to obstruct the view of street traffic, it cannot be inferred that any degree of darkness existed which would have prevented the plaintiff's driver from seeing the car with which he collided if he had actually looked down Madison avenue *for the purpose of observing what was there.*

This view of the case requires a reversal on the ground that the decision below is against the weight of evidence. I do not mean to be understood as holding that the plaintiff's driver was guilty of contributory negligence as matter of law; for under the authorities



his testimony to the effect that he looked and listened was probably enough to create a question of fact on that subject for the jury if the case had been tried before a jury, and for the Municipal Court judge, as the case actually was tried before him without a jury. (*Shaw v. Jewett*, 86 N. Y. 616; *Zwack v. N. Y., L. E. & W. R. R. Co.*, 160 id. 362.) But assuming that there was this question of fact for the trier to pass upon, I think it clear that the conclusion in favor of the plaintiff was contrary to the preponderance of proof, and hence we should grant a new trial, upon the usual conditions as to costs.

All concurred.

Judgment of the Municipal Court reversed and new trial ordered, upon the payment by the defendant of the costs of the trial already had; in default of compliance with this condition, the judgment is affirmed, with costs.

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In the Matter of the Application of DENIS COLEMAN, Appellant,  
for Leave to Issue Execution and Sell Certain Real Property.

KARSOH BREWING COMPANY and Others, Respondents.

*Sale of real property after the making of an order canceling a judgment which is subsequently on appeal therefrom sustained in part — the purchaser acquires a title free therefrom.*

In an action to enforce the statutory remedies for the mismanagement of a corporation, the Special Term made an order directing the cancellation of a judgment theretofore rendered against it. The judgment creditor took an appeal from the order and obtained a stay preventing the actual cancellation of the docket of the judgment. Pending the appeal the corporation was dissolved and a receiver was appointed who was directed to sell the real property of the corporation, subject to certain specified liens, not including the canceled judgment. The parties present at the sale had actual notice of the order directing the cancellation of the judgment. After the sale the Appellate Division rendered a decision sustaining, at a reduced amount, the judgment ordered to be canceled.

*Held*, that the purchaser at the sale acquired the property free from the lien of the judgment as reduced.

GOODRICH, P. J., dissented.

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**APPEAL** by the petitioner, Denis Coleman, from an order of the Supreme Court, made at the Queens County Special Term and entered in the office of the clerk of the county of Queens on the 1st day of July, 1902, denying the petitioner's motion for leave to issue execution upon a judgment recovered by him against the Mutual Brewing Company.

In an action brought to enforce the statutory remedies for the mismanagement of a corporation, the Special Term directed the cancellation of a judgment theretofore entered against the corporation. Pending an appeal by the judgment creditor, on which a stay was granted preventing the clerk from actually canceling the judgment, the corporation was dissolved in an action brought by the People of the State of New York, and a receiver was appointed, who, by direction of the court, sold the real estate of the corporation, subject to certain specified liens which did not include the canceled judgment. After the receiver's sale the Appellate Division handed down a decision sustaining, at a reduced amount, the judgment ordered to be canceled by the Special Term.

The judgment creditor, therefore, made a motion for leave to issue an execution against the corporation and the receiver for the amount of his judgment as reduced.

*John A. Dutton*, for the appellant.

*C. J. G. Hall* and *Uriah W. Tompkins*, for the respondents Karsch Brewing Company and others.

**PER CURIAM:**

A reference to the opinion of this court in *Halpin v. Coleman* (66 App. Div. 37) will furnish a sufficient statement of the facts involved in the present appeal. We there said that we did not then undertake to determine whether the Denis Coleman judgment was a lien upon the real property in question at the time of the sale of the receiver, inasmuch as that question had not yet been decided at the Special Term after a hearing on the merits. Such a decision has now been had, and has resulted in the order under review. It does not seem necessary again to discuss the questions of law which were considered in that opinion. It is sufficient to say that, under the circumstances as they existed at the time of the receiver's sale,

we think that the purchaser acquired the property freed from the lien of the Denis Coleman judgment.

It is true that the order of the Special Term canceling that judgment had not been carried into effect by an actual cancellation. The stay of proceedings granted by the Special Term judge had prevented such actual cancellation. But the fact that the court at Special Term had made an adjudication declaring the Denis Coleman judgment to be invalid and directing that it should be canceled, was actually known to the parties present at the sale, and, indeed, was expressly set out in the notice which the attorney for Denis Coleman read at the sale itself. Unless, therefore, the mere fact that an appeal was then pending from the Special Term adjudication had the effect of preserving the judgment, just as though it had never been pronounced invalid, the purchaser who acted on the faith of the order vacating the judgment must be held to have dealt with the property as if the judgment had never been a lien upon it. The transaction was entered into while the judgment appeared, from the adjudication of the Special Term, to be invalid, and at the time of the payment by the purchaser, the property was freed from the lien of the judgment. (See *King v. Harris*, 30 Barb.471; *affd.*, 34 N. Y. 330.) The sale was a judicial sale at which the property was offered expressly subject to certain liens, not including the lien of this Denis Coleman judgment.

While the question is a nice one, which ought finally to be settled by the court of last resort, we think that authority supports the view herein expressed, and that the order should, therefore, be affirmed.

All concurred, except GOODRICH, P. J., who read for reversal.

GOODRICH, P. J. (dissenting):

I dissent. The docket of the judgment still remains uncanceled. By the Code of Civil Procedure a judgment is not a lien on real estate until it is docketed, and when docketed, except as otherwise provided by law, continues to be a charge upon real estate for ten years. (§§ 1250, 1251.) Section 1256 provides that the court may order the docket of a judgment to be marked "lien suspended upon appeal" where the judgment is appealed from and a sufficient undertaking given. In such case the lien of the judgment is suspended as against judgment creditors and purchasers and mortgagees

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in good faith. The reason is clear. Security has been given for the payment of the judgment if it shall be affirmed. But in the present case the cancellation of the lien on the docket was stayed, and this and the docket afforded constructive notice of the lien. At the sale notice was given of the judgment and the appeal, and this was actual notice to the purchaser of the judgment and of the appeal, and he was bound to take notice of the non-cancellation of the docket. (See *Holmes v. Bush*, 35 Hun, 637.) *King v. Harris* (34 N. Y. 330), cited in the per curiam opinion, does not seem to me to be authority for the respondent's contention, as in that case the judgment had been "vacated and wholly set aside" and an entry of its vacatur made on the docket of the judgment by order of the court.

I think the order should be reversed.

Order affirmed, with ten dollars costs and disbursements.

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THE PEOPLE OF THE STATE OF NEW YORK ex rel. DAVID HAVRON, Appellant, v. WILLIAM DALTON, as Commissioner of Water Supply of the City of New York, and JAMES MOFFETT, as Deputy Commissioner of Water Supply for the Borough of Brooklyn, City of New York, Respondents.

*Findings or short decision, where an issue is joined upon an alternative mandamus — procedure on appeal in the absence thereof.*

Where an issue of fact, joined upon an alternative writ of mandamus, is tried before a judge without a jury, the parties having waived a jury trial, it is the duty of the trial judge to make and file findings or a short decision.

Where, on an appeal, in such a case, from an order dismissing the writ, it appears from the record that the trial judge omitted to make the requisite findings or decision, the Appellate Division will remit the case to the trial judge in order that the findings or decision may be made *nunc pro tunc*.

APPEAL by the relator, David Havron, from an order of the Supreme Court, made at the Kings County Trial Term and entered in the office of the clerk of the county of Kings on the 18th day of November, 1901, dismissing an alternative writ of mandamus theretofore issued in the proceeding.

*Alexander H. Geismar*, for the appellant.

*James McKeen*, for the respondents.

WILLARD BARTLETT, J. :

This case must be sent back to the judge before whom it was tried in order that he may make and file a decision. The proceeding is based upon an alternative writ of mandamus. The Code of Civil Procedure provides that an issue of fact, joined upon such a writ, must be tried by a jury unless a jury trial is waived or a reference is directed by consent of the parties. (Code Civ. Proc. § 2083.) In the present case a jury trial was waived, and the issues were tried before a judge, who determined them in favor of the respondents; and made a final order dismissing the writ. The appeal papers, however, indicate that he omitted to make and file a decision as the basis of this final order. We are of opinion that such a decision is requisite. Section 2082 of the Code of Civil Procedure prescribes that the proceedings upon an alternative writ of mandamus, after issue is joined, are, in all respects, the same as in an action; and section 2084 directs that upon the trial of an issue of fact, joined upon an alternative writ, the verdict, report or decision must be returned to the Appellate Division or the Special Term, as the case requires. When, therefore, the issues are tried before a judge, instead of before a jury, they are to be decided in the same way as the issues in an action; that is to say, by making and filing findings, or a short decision, as prescribed in section 1022 of the Code.

Where the requisite findings or decision have been omitted upon the trial of an action and the case on appeal has disclosed such omission, it has been the custom of this court to remit the case to the trial judge, in order that the requisite decision may be made *nunc pro tunc*. (*Hall v. Boston*, 13 App. Div. 116; *Shaffer v. Martin*, 20 id. 304.) The same course should be pursued in the present case.

All concurred.

Proceeding remitted to the trial judge for decision.

CLARENCE DE WITT ROGERS, Respondent, v. THE BOARD OF SUPERVISORS OF WESTCHESTER COUNTY and Others, Defendants, Impleaded with JAMES L. TAYLOR and Others, Appellants.

*Temporary injunction granted to a taxpayer — when it will not be disturbed — unauthorized publication of abstracts of town and county accounts — payment therefor restrained — good faith no defense.*

In a taxpayer's action the Special Term may, in the exercise of its discretion, properly grant the plaintiff a temporary injunction, and the Appellate Division will not disturb such injunction upon appeal unless it appears on an examination of the complaint that the taxpayer is clearly and certainly not entitled to the ultimate relief which he seeks.

The plaintiff, in a taxpayer's action, is not obliged to show that he will suffer peculiar injury from the act which he seeks to enjoin; it is enough for him to show that he has the status of a taxpayer which the statute prescribes and that the act of the defendant is one which the law forbids.

Section 51 of the County Law (Laws of 1892, chap. 686) and section 170 of the Town Law (Laws of 1890, chap. 569), relative to the publication of the abstracts of town and county accounts, contemplate that all the abstracts shall be grouped together in a single publication.

The practice of publishing portions of the town abstracts in different newspapers throughout the county is unauthorized, and a taxpayer of the county is entitled to an injunction restraining the payment of bills incurred for such publications.

The fact that the publications were made in good faith and in accordance with a custom which had been established in the county does not entitle the newspaper publishers to receive payment therefor, as they are bound to know the limitations imposed upon the powers of the county officials.

APPEAL by the defendants, James L. Taylor and others, the proprietors of certain newspapers published in Westchester county, from an order of the Supreme Court, made at the Kings County Special Term and entered in the office of the clerk of the county of Westchester on the 17th day of May, 1902, enjoining the board of supervisors of Westchester county, the clerk of said board and the treasurer of said county from paying certain bills for the publication of legal notices in such newspapers.

*H. T. Dykman*, for the appellants.

*Philo P. Safford*, for the respondent.

WOODWARD, J. :

This is a taxpayer's action, and the rule is well settled that in actions of this character the court in the exercise of its discretion may properly grant the plaintiff an injunction, and that it will be sustained unless "we are able to see on an examination of the complaint that he is clearly and certainly not entitled to the ultimate relief which he seeks." (*Ziegler v. Chapin*, 126 N. Y. 342, 347; *Warrin v. Baldwin*, 105 id. 534, 537; *Armstrong v. Grant*, 56 Hun, 226, 228, 229. See, also, *Peck v. Belknap*, 130 N. Y. 394, 398, 399; *Webb v. Bell*, 22 App. Div. 314, 318, 319.) An examination of the complaint in this action discloses no reason for believing that the plaintiff may not ultimately succeed in establishing his right to the permanent injunction prayed for, and it would be improper, therefore, to interfere with the order appealed from.

Westchester county is a municipal corporation (County Law, Laws of 1892, chap. 686, § 2), and the rule is fundamental that municipal, like private, corporations must act within the limitations prescribed by the sovereign power, and they cannot impose a charge upon the person or property of individuals unless they proceed in the manner prescribed by law. (*Matter of Petition of George Douglass*, 46 N. Y. 42; *Dickinson v. City of Poughkeepsie*, 75 id. 65, 73; *Kingsley v. Bowman*, 33 App. Div. 1, 6; *Matter of South Market Street*, 76 Hun, 85, 91.) The plaintiff in this action is a taxpayer; his property is about to be taken to pay bills for which, if the allegations of his complaint are true, there is no warrant of law. He has, therefore, all of the rights which any other citizen has whose property is about to be taken without due process of law. In such an action as the present one the plaintiff is not bound to show that he will suffer peculiar injury; he is appearing in behalf of himself and all other taxpayers, and it is enough for him to show that he has the status as a taxpayer which the statute prescribes and that the act of the defendant is one which the law forbids. (*Gerlach v. Brandreth*, 34 App. Div. 197, 199; *Bush v. O'Brien*, 164 N. Y. 205, 215; *Ayers v. Lawrence*, 59 id. 192; *Gorden v. Strong*, 158 id. 407, 408; *Wenk v. City of New York*, 171 id. 607, 614, 615, and authorities there cited.)

The defendants who appeal are the owners of certain newspapers published in Westchester county, and have been publishing, upon

the order of the clerk of the board of supervisors, certain abstracts of town and county accounts, the bills for which aggregate something over \$16,000, and the present action is brought to restrain the board of supervisors from auditing and paying these bills. It appears to be conceded that the provisions of section 51 of the County Law, which, in connection with section 170 of the Town Law (Laws of 1890, chap. 569), is the only authority suggested for the publication of town and county abstracts, has not been complied with, but it is urged on the part of the appellants that the custom has been established in Westchester county of publishing the matters here involved in the manner adopted by the clerk, and that the publication having been made in good faith the county ought to pay the bills and, as a consequence, that the injunction ought not to have been allowed. But common custom, in excess of corporate powers, does not make the law. It is provided by section 10 of the General Corporation Law (Laws of 1892, chap. 687, as amd. by Laws of 1895, chap. 672) that "No corporation shall possess or exercise any corporate powers not given by law, or not necessary to the exercise of the powers so given," and the rule is established by authority that a contract with a municipal corporation in excess of its corporate powers is invalid. (*Swift v. Falmouth*, 167 Mass. 115, 121, and authorities there cited; *Whiteside v. United States*, 93 U. S. 247, 257; *Hawkins v. United States*, 96 id. 689, 691, and authorities there cited.) Section 51 of the County Law provides: "The clerk shall annually, on or before the first day of January, make out and certify, and within two weeks cause to be published in a newspaper printed in the county, with the abstract of accounts furnished by town auditors, a statement for the preceding year, containing:

"1. An abstract of all county accounts presented to the board at its last annual meeting, allowed or disallowed, with the amount claimed and allowed, and the name of each person presenting the same, and the general nature of the account.

"2. The amount, items and nature of all compensation, audited by the board to each member thereof.

"3. The number of days the board was in session, and the distance traveled by each member in attending the same."

Section 170 of the Town Law provides: "Boards of town auditors shall annually make brief abstracts of the names of all persons



who have presented to them accounts to be audited, the amounts claimed by each of such persons, and the amounts finally audited by them respectively, and shall deliver such abstracts to the clerk of the board of supervisors, and the clerk shall cause the same to be printed, with the statements required to be printed by him."

Clearly the purpose of the statute was not to give every person in the county a detailed statement of accounts, but to require a publication of an official nature which might be found and investigated if abuses crept in, and the statute clearly required that all of the matters mentioned in section 51 of the County Law should be grouped together in a single publication, so that the seeker after information might find it all in one place. Instead of doing this, the clerk of the board of supervisors, with the approval of the board of supervisors, as evidenced by a formal resolution, has been in the habit of making up the abstracts of certain towns and publishing them in papers which, we may assume, he believed would give the largest notice to the people directly interested in the accounts, while other towns were parceled out to other newspapers in other parts of the county, but in none of them, or at least in very few of them, has he published all of the matters required to be published by the County Law. There is no authority for publishing the abstract of town accounts for a few towns in one part of the county and a few more in another part of the county. The authority of the statute, and there is no other, is to publish these matters in "a newspaper printed in the county," and when that has been done the authority is at an end, and all of the legitimate purposes of the law have been served. It has not been complied with by cutting these matters up into parcels and distributing them among thirty or forty newspapers, so that the searcher after the financial records of the towns and county will never know when he has them all, and the defendant newspapers, in contracting with an official of the municipality, are bound to know the limitations on his powers. So far as we discover, there has been no legal publication such as the statute requires, certainly not on the part of a large majority of the claimants, and the contract cannot be ratified by either party, because it could not have been authorized by either; no performance on either side can give the unlawful contract any validity or be the foundation of any right of action upon it. When

a corporation is acting within the general scope of the powers conferred upon it by the Legislature, the corporation, as well as persons contracting with it, may be estopped to deny that it has complied with the legal formalities which are prerequisites to its existence or its action, because such prerequisites might, in fact, have been complied with. But when the contract is beyond the powers conferred upon it by existing laws, neither the corporation nor the other party to the contract can be estopped, by assenting to it or by acting upon it, to show that it was prohibited by those laws. (*Louisville, etc., Ry. Co. v. Louisville Trust Co.*, 174 U. S. 552, 572, and authorities there cited.) If the parties to the contract cannot be estopped to question the extent of the powers of the corporation, the plaintiff, as a taxpayer, certainly has a right to interfere to prevent the payment of claims against the county for which there is no authority of law, and it was proper, therefore, that an order of injunction should issue.

The order appealed from should be affirmed, with costs.

All concurred, except JENKS, J., not sitting.

Order affirmed, with ten dollars costs and disbursements.

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JAMES E. CORCORAN, Appellant, v. THE NEW YORK, NEW HAVEN  
AND HARTFORD RAILROAD COMPANY, Respondent.

*Railroad — rule as to keeping an employee to warn a laborer, engaged in sweeping switches, of the approach of shunted cars.*

Where it appears that it is customary, when shunting cars in a railroad yard, to station a brakeman at the front end of the cars being shunted, the necessity of promulgating a rule that some other employee shall be detailed to keep constant watch over a laborer employed in sweeping switches in the yard in sight of the shunted cars, in order to prevent such laborer from being struck by the shunted cars, is not so obvious as to make the question one of common experience and knowledge.

APPEAL by the plaintiff, James E. Corcoran, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of Dutchess on the 31st day of January,

1902, upon the dismissal of the complaint by direction of the court after a trial at the Dutchess County Trial Term.

*Caleb Birch, Jr.*, for the appellant.

*Walter C. Anthony*, for the respondent.

JENKS, J.:

We held on the first appeal (46 App. Div. 201) that the fault of the defendant, if any, was failure to promulgate proper rules for the management and conduct of the movement of its cars and to direct that proper warnings be given. We held on the second appeal (58 App. Div. 606) that the court erred in its refusal to charge that the jury were not authorized to find a rule necessary or proper for the management in question unless there was proof of such a rule in force on some other roads, or that it was practicable and reasonable to provide against such an accident by a rule, or unless the propriety and necessity of that particular rule were so obvious as to make it a question of common experience and knowledge, citing *Berrigan v. N. Y., L. E. & W. Railroad Co.* (131 N. Y. 582). It is now contended that the case is cured of former defects, and that it presented a question for the jury.

The learned counsel for the appellant states that the record does not show that on the previous appeals *Doing v. N. Y., O. & W. R. Co.* (151 N. Y. 579) was called to our attention. This statement must be inadvertent, for I find that *WOODWARD, J.*, who then wrote for the court, names and distinguishes that case in his opinion (58 App. Div. 606, 608). It is further urged that the *Doing* case holds that the "kicking" of cars is of itself a dangerous and negligent practice. I think that the case does not go so far. In *Dowd v. N. Y., O. & W. R. Co.* (170 N. Y. 459) the court, per *VANN, J.*, say: "The practice of kicking cars from one track to another, upon which men are at work and so situated that they cannot see the approaching danger, was recently condemned by us as dangerous and reckless. (*Doing v. N. Y., Ont. & W. R. Co.*, 151 N. Y. 579, 583.)" The learned counsel loses sight of the qualifying phrase "and so situated that they cannot see the approaching danger," which discriminates this case from the *Doing* and *Dowd* cases. *Doing* was at work in a repair shop, which afforded no view of the

exterior track at the time the shunted car crashed through the doors of the shop and killed him. Dowd, when killed, was at work as a repairer under a car situated near the middle of a train of twenty-five coal cars. This plaintiff was employed in sweeping the snow off the frog of a switch in the open yard and in the daytime, and although the day was stormy and snowy, yet it was not pretended that he could not have seen the approaching danger. The plaintiff has the burden of showing the shortcoming of the defendant in making proper regulations for employees and in the conduct of the business of its yard. (*Potter v. N. Y. C. & H. R. R. Co.*, 136 N. Y. 77; *Rose v. Boston & Albany R. R. Co.*, 58 id. 217.) In *Berrigan v. N. Y., L. E. & W. Railroad Co.* (*supra*) the court say: "The learned trial judge submitted to the jury the question whether the defendant was at fault in omitting to make and publish such a rule. This opened to the jury a wide field for speculation and conjecture. In the absence of some proof on the part of the plaintiff that such a rule was in operation by other roads or of persons possessing peculiar skill and experience in the management and operation of railroads to the effect that such a rule was necessary or practicable under the circumstances, or unless the necessity and propriety of making and promulgating such a rule was so obvious as to make the question one of common experience and knowledge, the court is not warranted in submitting such a question to the jury."

It is urged that the proof showed that a rule should have required the foreman to keep guard over his men, to give them personal warning, and if called away to put another in his stead. The witness Cogina, a "laborer at railroading generally," testified that he had worked in other yards, that the foreman naturally stood and watched the green men, and if he went away with a part of the gang, there is "some man got power to protect the men." This was testimony as to a practice, but when he was questioned as to any rule for such practice elsewhere, he said that the rule of the New York Central was that "handcar men in all cases, the boss of that gang should protect himself and his men." Such a rule obviously would have no application to an employee sweeping snow off a switch in the railroad yard. On the other hand, I think it cannot be said that the necessity and propriety of making a rule

that a boss or his *alter ego* should stand over every laborer employed in sweeping switches in a railroad yard under all circumstances was so obvious as to make the question one of common experience and knowledge. The plaintiff had been employed about the yard of the defendant for five weeks. He was injured at eleven o'clock in the morning while sweeping the snow off the frog of a switch. He testified that he knew the only possible danger could come from the south, and that during his several hours of employment he looked to the south several times. His witness Denaught, who was a brakeman on the front end of the front car of the "kicked" train at the time, testified that the cars were moving at the rate of six to eight miles an hour; that although it was snowing and blowing quite hard at the time, he could see two, three or four car lengths ahead before he saw the plaintiff, and at that distance he saw the plaintiff and "hollered" to him, but in vain, and that he failed to reach the brake at the other end of the car in time to stop the shunted cars. If the car was thirty-four feet long, and the brakeman who, pursuant to the practice of the yard, was stationed at the front of the first car to give warning, saw the plaintiff and gave warning when the first car was from 102 to 126 feet away, traveling at six to eight miles an hour, the necessity and propriety of making a rule that some other employe should stand to keep constant watch over a man simply sweeping a switch is not so obvious as to make the question one of common experience and knowledge. Even if the defendant had made a rule that the lookout should be stationed with the worker rather than on the "kicked" cars, the precautions are of similar nature, and it is debatable which of such similar safeguards is the better. If, on the other hand, the accident was due to the brakeman quitting his place of warning to reach the brake at the other end of the car, instead of continuing his outcry, of course, under the facts of this case, there is no liability upon the defendant.

The testimony of Cox, a foreman of the West Shore railroad, is to the same effect as that of Cogins, namely, that if he were out with a gang he made it a business to watch the men and to have his men watch the cars at the same time. But he did not show that, previous to the accident or at the time thereof, there was any rule extant which might, if adopted by the defendant, have pre-

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vented the accident. The particular rule read in evidence, if applicable to the case at bar, was not shown to have been in existence when the accident happened, while the testimony as to instructions which antedated the rule was too vague to afford any basis for submission of the question to the jury. It did not appear that there was any rule or regulation which required the use of the red flag when cars were shunted or "kicked," but only to protect men working in cars and on the main track when workmen were tearing up the track. On the other hand, the plaintiff's witness Joseph testified on cross-examination that there was no practicable way that could be devised other than that employed at the time the plaintiff was injured.

I think that the plaintiff's proof did not meet the standard, and that the court, WILMOT M. SMITH, J., properly nonsuited the plaintiff.

Judgment unanimously affirmed, with costs.

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DAVID JENKINS, Appellant, v. HENRIETTA L. BAKER, Individually and as Executrix, etc., of EMELINE JENKINS, Deceased, Respondent, Impleaded with HORACE S. JENKINS, as Executor, etc., of EMELINE JENKINS, Deceased.

77	509
82	506
40 Mls	91

*A savings bank deposit made "in trust" for another — an implication arises therefrom, in the absence of proof to the contrary, of an intention to create a trust — it is not rebutted by the fact that the money is subsequently withdrawn.*

In October, 1899, a woman opened a savings bank account in her own name in trust for her husband, and deposited therein sums which, with interest, aggregated \$1,897.56. In May, 1900, she drew out all of such sums and gave \$650 thereof to her daughter. She died in July, 1900, without disclosing to her husband the existence of the account or making any declaration in respect thereto.

*Held*, that, in the absence of testimony showing a contrary intention, the opening of the account in trust furnished sufficient proof that the woman intended to create a trust in favor of her husband;

That the fact that the woman had drawn all the money out of the account before her death did not rebut the inference to be drawn from the opening of the account.

APPEAL by the plaintiff, David Jenkins, from a judgment of the Supreme Court in favor of the defendant, Henrietta L. Baker, individually and as executrix, etc., of Emeline Jenkins, deceased, entered in the office of the clerk of the county of Kings on the 22d day of October, 1901, upon the decision of the court rendered after a trial at the Kings County Special Term, and also from an order entered in said clerk's office on the 22d day of October, 1901, denying the plaintiff's motion for a new trial.

*Ira Leo Bamberger*, for the appellant.

*James B. Sheehan*, for the respondent.

JENKS, J.:

The Special Term gave judgment for the defendant. In the opinion denying the motion for a new trial the learned justice wrote that he was not satisfied with the decision filed, but that he did not see how he could change it. He summarizes the facts as follows: "The wife of the plaintiff opened an account in a savings bank in her own name, in trust for him, in October, 1899, and deposited to the said account sums which, with interest, aggregated \$1,397.56. In May, 1900, she drew out all of the said account and gave \$650 thereof to her daughter, the defendant Baker. She died in July, 1900, and this suit was begun afterwards. She never made such account known to her husband or made any declaration in respect of it. The naked facts of opening such account, and depositing and drawing out the money is\* all that we have." And he then writes: "My view on the trial was that the fact of opening the account in trust was in and of itself a declaration of trust and evidence sufficient to prove a trust in favor of the husband, and that therefore a finding of fact that such trust was created had to be made unless the defendant introduced evidence showing that the deceased wife did not intend to create such a trust, but opened the account in such form for some reason of convenience or purpose other than to form a trust; and no such evidence was introduced. But the opinion in the recent case of *Cunningham v. Davenport* in our highest court prevented me from adhering to that view and so deciding. Such opinion is very explicit, that the fact of opening such

\* *Sic.*

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a trust account is equivocal, *i. e.*, no more consistent with the creation of a trust than with some other purpose on the part of the depositor, and that therefore a finding of fact thereon that a trust was created cannot be made *unless the depositor has died leaving the account existing*. How such fact of death can be in any way probative of the depositor's intent at the time of opening the account is not explained. The present case is barren of such fact, the depositor having drawn out the money and closed the account before she died."

*Cunningham v. Davenport* (147 N. Y. 43) did not directly present the question up in this case. In the *Cunningham* case the plaintiff survived the alleged beneficiary and testified at the trial that he did not intend to create a trust and never intended to give his brother the money. Such testimony, under the circumstances of the case, was held sufficient to prevent a court of equity from spelling out a trust. In the course of the opinion the court cites the language of ANDREWS, J., from *Mabie v. Bailey* (95 N. Y. 206) to indicate that it was the opinion of the court in the *Mabie* case, if the point had been presented, that the mere fact of the deposit did not "conclusively" establish the trust so as to preclude evidence of contemporaneous facts and circumstances constituting the *res gestæ*, to show that the real motive of the depositor was not to create a trust. It seems to me that the scope of the decision in *Cunningham v. Davenport*, was that as evidence was admissible to explain the depositor's intent in the *original transaction*, the testimony of the depositor in the light of the surrounding contemporaneous circumstances was admissible and sufficient to overcome the *prima facie* case of irrevocable trust which was made out by the naked fact of the deposit. The difficulty arising from the *Cunningham* case that besets the learned justice arises (and indeed he so states) from the language of the opinion, not from the decision itself.

But there is a more recent case of the Court of Appeals which, to my mind, obviates that difficulty, namely, *Farleigh v. Cadman* (159 N. Y. 169). In that case Cadman, in 1878, opened an account of \$778 in his own name "in trust for Cora I. Cadman." The trustee made various other deposits and drew out certain sums which he applied to the plaintiff's benefit. On January 7, 1889, on account of his umbrage at the marriage of the alleged beneficiary



he drew out the entire sum standing to the credit of the account and opened a new account in his own name in trust for his own son. Thereafter the trustee died and the defendant drew out all of the money. Judgment originally was given for the plaintiff, the alleged beneficiary, for \$778. The defendant appealed "because the plaintiff was permitted to recover the amount of the original deposit of \$778, and interest, and the plaintiff because she was not permitted to recover the sums subsequently deposited to the credit of the trust account prior to the time it was closed by the trustee on the 7th of January, 1889, and the proceeds transferred to the new account in trust for the defendant." The case showed that the trustee (depositor) did not die leaving the account existing. This feature was directly presented and pressed upon the court. I have examined the printed points of the counsel for the defendant (Vol. 1487, Court of Appeals Cases, Law Library, Brooklyn; Vol. 2282, N. Y. State Library), and I find that the second point deals with the \$778. After stating that the case is somewhat similar to *Martin v. Funk* (75 N. Y. 134), etc., the learned counsel says: "We need hardly discuss the earlier cases because in the last case (*Cunningham v. Davenport*) all the previous cases were discussed by this court, and this court in reference to them all said as follows (p. 47): 'The doctrine laid down by this court in previous cases amounts to this: That the act of a depositor in opening an account in a savings bank in trust for a third party, the depositor retaining possession of the bank book, and failing to notify the beneficiary, creates a trust, *if the depositor dies before the beneficiary leaving the trust account open and unexplained*. If the intent can be strengthened by acts and declarations of the depositor in his lifetime, amounting to publication of his intention, a more satisfactory case is made out, but it is not absolutely essential in the absence of explanation where he dies leaving the trust account existing.' Here then are stated four facts which the court says 'create a trust:' \* \* \* 4. The trust account being open and unexplained at his death \* \* \* .

The difference between the present case and this language of the Court of Appeals is very manifest. We have here the act of a depositor in opening an account in his own name in trust for the plaintiff, but with the expressed purpose of retaining the control of it.

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We have the depositor retaining possession of the bank book and dying before the beneficiary. But the fourth element mentioned is entirely lacking. The depositor treated the account as his own from the beginning. He did not leave the account 'open.' He closed it before he died. He made a new and inconsistent deposit of the money. He did not 'leave the trust account existing.' He destroyed it."

Thus it appears that the question which perplexed the learned judge in the case at bar was directly involved in *Farleigh v. Cadman*, and that the counsel in that case presented to the court the same authority and urged his contention on grounds substantially similar to those which had so much weight with the learned judge in the case now up. Under these circumstances, the court in its opinion per O'BRIEN, J., lays down the general proposition: "It cannot be doubted that a valid and irrevocable trust was thereby created for the plaintiff's benefit, within all the authorities on that subject. (*Martin v. Funk*, 75 N. Y. 134; *Willis v. Smyth*, 91 N. Y. 297; *Mabis v. Bailey*, 95 N. Y. 206; *Beaver v. Beaver*, 117 N. Y. 421; *Cunningham v. Davenport*, 147 N. Y. 43; *Fowler v. Bowery Savings Bank*, 113 N. Y. 450; *Schluter v. Bowery Savings Bank*, 117 N. Y. 125.)"

The court considers *Cunningham v. Davenport*, saying: "There is nothing in the case of *Cunningham v. Davenport* (*supra*) that conflicts in any respect with this conclusion. In that case it was held that the proof did not establish an intention on the part of the alleged donor to establish a trust for the benefit of the alleged beneficiary. But all the facts that were necessary to establish the trust which were absent in that case are notably present in this; and, moreover, the provision of the Constitution\* and the statute† which forbids this court to review the decision of the court below, when it is unanimously held that the findings of fact are supported by evidence, did not apply to that case as it does to this." And again it is said (p. 174): "The control which the trustee exercised over the later deposits was not different from that which he exercised over the first one, since he drew the whole out at the same time and attempted to create a new trust with the pro-

\* Art. 6, § 9.—[REP. † Code Civ. Proc. § 191, subd. 4.—[REP.

ceeds of the first one for the benefit of the defendant. But the right of the plaintiff having attached to the whole sum when and as fast as it was deposited, the trustee could not affect these rights without her consent. The trustee could not destroy a trust once established by attempting to divert the fund from the beneficiary to other purposes, and that is what he undertook to do when he changed the form of the original transaction and substituted another beneficiary in the place of the plaintiff." And finally it is said (p. 175): "The result is that the plaintiff was entitled to the whole sum to the credit of the trust account, including accumulated interest, on the day that the account in plaintiff's name as beneficiary was closed by the act of the trustee." I find, then, in this decision an explicit cogent expression and reiteration of the principle of *Martin v. Funk* (*supra*) and kindred cases, and a refusal to limit the principle by the further condition that the depositor must have died leaving the account existing.

I am of opinion, not only for the reasons so acutely and ably stated by the learned trial justice in his opinion, but by the final authority, that his view of the law entertained upon the trial as stated by him was entirely correct. The old General Term of this department and this court have had occasion to discuss the general question in several cases, among them *Scott v. Harbeck* (49 Hun, 292); *Decker v. Union Dime Savings Institution* (15 App. Div. 553); *Williams v. Brooklyn Savings Bank* (51 id. 332), and *Robertson v. McCarty* (54 id. 103). In the case last named the opinion of HIRSCHBERG, J., contains an elaborate review of all the authorities (including the *Farleigh* case) and is so thorough and exhaustive a discussion of the precise question in this case that I can add nothing to it.

Inasmuch as the learned justice states that he did not feel himself free to apply his original view (which I think was the correct view of the law) and that he was not satisfied with the decision which he filed, we should grant a new trial.

All concurred.

Judgment and order reversed and new trial granted, costs to abide the final award of costs.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. WILLIAM MURRAY, Appellant, v. GUSTAV LINDENTHAL, Commissioner of Bridges of the City of New York, and WILLIS L. OGDEN and Others, Municipal Civil Service Commissioners of the City of New York, Respondents.

*Mandamus — the existence of a remedy by action makes its granting discretionary.*

While there is no inflexible rule that the mere existence of a remedy by action will defeat an application for a writ of mandamus, yet where such a remedy exists the application for a mandamus is addressed to the sound discretion of the court.

APPEAL by the relator, William Murray, from an order of the Supreme Court, made at the Kings County Special Term and entered in the office of the clerk of the county of Kings on the 20th day of May, 1902, denying the relator's motion for a peremptory writ of mandamus.

*S. E. Fairfield* and *C. P. Dillon*, for the appellant.

*James McKeen* [ *Walter S. Brewster* with him on the brief ], for the respondents.

JENKS, J. :

The relator moved for the issue of a writ of peremptory mandamus that the defendants prepare the payrolls of the relator at a certain salary. He deposed that he was appointed a bridgekeeper in 1898 at a certain salary, which was increased in 1900, and afterwards reduced. He contended that the reduction was illegal. The respondents answered that the relator was appointed to the temporary position of bridgekeeper pending the preparation of the appropriate eligible list ; that a bridgekeeper was subject to competitive civil service examination, but a bridgetender was subject to physical examination only ; that relator was examined only for the latter position, permanently appointed to that position only, and that he has been paid its salary. The relator by these proceedings sought to recover a sum which in amount is the difference between the salaries of bridgekeeper and bridgetender. The Special Term, Mr. Justice WILMOT M. SMITH presiding, denied the motion upon

the grounds of laches and that there was remedy by action. While there is no fast rule that the mere existence of a remedy by action defeats an application for a mandamus, yet where such remedy exists the application for mandamus is addressed to the sound discretion of the court. (*People ex rel. Beck v. Coler*, 34 App. Div. 167; *People ex rel. Treat v. Coler*, 56 id. 459; *affd.*, 166 N. Y. 144.) Without expression of opinion on the merits of his claim, I am clear that the relator has a remedy by action, and that the denial of the application was within the sound discretion of the Special Term. The order should, therefore, be affirmed, with ten dollars costs and disbursements of the appeal.

All concurred.

Order affirmed, with ten dollars costs and disbursements.

# Cases

DETERMINED IN THE

## THIRD DEPARTMENT

IN THE

APPELLATE DIVISION,

December, 1902.

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THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. MANHATTAN FIRE INSURANCE COMPANY OF THE CITY OF NEW YORK, Defendant.

OTTO KELSEY, as Receiver of the MANHATTAN FIRE INSURANCE COMPANY OF THE CITY OF NEW YORK, Appellant.

*Accounting by receivers of moneyed corporations — chapter 60 of the Laws of 1902 is applicable to receiverships created prior to its passage.*

Chapter 60 of the Laws of 1902, which regulates accountings by receivers of moneyed corporations, affects the procedure only, and it was competent for the Legislature to make such statute applicable to accountings by receivers who had been appointed prior to its passage.

APPEAL by Otto Kelsey, as receiver of the Manhattan Fire Insurance Company of the City of New York, from so much of an order of the Supreme Court, made at the Columbia Special Term and entered in the office of the clerk of the county of Albany on the 25th day of October, 1902, as denies said receiver's motion to confirm the report of a referee appointed in June, 1902, to take and state the receiver's accounts, etc., ascertaining and fixing his liabilities for legal expenses, attorney's services or counsel fees for the year commencing May 11, 1901, and ending May 10, 1902.

*G. D. B. Hasbrouck and Russel S. Johnson, for the appellant.*

*John C. Davies, Attorney-General, for the respondent.*

## PER CURIAM:

We think the matter of accounting by receivers of corporations formed for banking or insurance is governed by the provisions of chapter 60 of the Laws of 1902, which went into effect February 26, 1902. As a question of procedure it is wholly within the control of the Legislature. The act referred to is not prospective only, but in plain terms is made to apply to all receivers of this class of corporations theretofore appointed.

"§ 9. This act shall apply to all actions for the appointment of receivers of monied corporations brought by the attorney-general, and to all receivers of such corporations heretofore or hereafter appointed, and to the settlement and adjustment of their accounts and distribution of assets in their hands, and all proceedings with reference thereto hereafter to be taken, and shall supersede and repeal all provisions of law inconsistent herewith."

While the provisions of this law cannot affect the contract of employment of counsel made by the receiver before its passage, or payments made to counsel before its passage, it changes the old practice of partial settlements by a receiver, and the annual or semi-annual accounting under Special Term orders which prevailed under the act of 1883 (Chap. 378, as amd. by Laws of 1885, chap. 40). *People v. Knickerbocker L. Ins. Co.*, 31 Hun, 622; *Matter of Commonwealth F. Ins. Co.*, 32 id. 78.)

The act of 1883, as amended by chapter 40 of the Laws of 1885, provided (§ 4) for a semi-annual statement showing the account of the receiver in detail to be filed — in cases of insurance companies — with the Superintendent of Insurance and with the Attorney-General, and to be presented to the Special Term of the Supreme Court, "and it shall be unlawful for any receiver of the character specified in this section to pay to any attorney or counsel any costs, fees or allowances until the amounts thereof shall have been stated to the Special Term in this manner, as expenses incurred, and shall have been approved by that court by an order of the court duly entered." Under the law of 1902 (§ 6) it is provided, "The receiver is not required or authorized to file any account, except as herein provided, except by special order of the court," and no accounting is provided for except a final account or one specially directed by the court. It will also be observed that under the act of 1902 (§ 4) the receiver

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may employ one counsel and make such payment on account for legal services during the progress of the receivership as may be just and proper, on the written approval of the Attorney-General, subject, however, to investigation, allowance or disallowance by the court on final settlement when all parties interested can be heard. There seems to be no serious difficulty in this change as applied to unsettled matters, matters not disposed of under the old practice when the law of 1902 went into effect. It is a change of practice only, and interferes with no vested rights. The receiver was required under the old law to obtain an order of court before he paid counsel. The payment may be made now subject to approval of the court on final settlement. The law of 1902, we think, is controlling in the case before us, and the Special Term order appointing a referee to state and pass upon the receiver's accounts, which order was made after the act of 1902 went into effect, was unauthorized, and the order refusing to confirm the report of the referee was proper.

All concurred.

Order affirmed, without costs.

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HANORAH KELLY, Appellant, v. MICHAEL J. KELLY, as Committee of the Estate of MARY ANN KELLY, a Lunatic, Respondent.

*Security for costs — cannot be required of the committee of an incompetent in an action against him.*

The express permission given to the court in section 3271 of the Code of Civil Procedure, to require security for costs to be given in an action brought by the committee of an incompetent, is an implied denial of the right to require the giving of such security in an action brought *against* such a committee.

APPEAL by the plaintiff, Hanorah Kelly, from an order of the Supreme Court, made at the Albany Special Term and entered in the office of the clerk of the county of Rensselaer on the 30th day of April, 1902, granting the defendant's motion to require the plaintiff to furnish security for costs.

John T. Norton, for the appellant.

John P. Curley, for the respondent.



PER CURIAM :

By section 3271 of the Code of Civil Procedure the court is authorized, in its discretion, to require the plaintiff to give security for costs in an action brought by the committee of a person judicially declared to be incompetent to manage his affairs. No authority is therein given to require security for costs in an action brought against such committee. If we assume for the argument that prior to the Code provision the court had power to require security for costs in certain cases, the express permission contained in section 3271 to require security in an action brought by a committee would seem to contain an implied denial of the right to require security in an action brought against such a committee. This implication would also seem to be strengthened by the first provision of the section which authorizes security to be given in certain cases when brought by or against an executor, etc.

The order should be reversed, with ten dollars costs and disbursements.

All concurred.

Order reversed, with ten dollars costs and disbursements, and motion denied.

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HIRSH T. ROBINSON, as Administrator, etc., of LYDIA J. ROBINSON, Deceased, Respondent, v. JOHANNA CARPENTER, as Administratrix, etc., of CHARLES E. CARPENTER, Deceased, Appellant.

*Proof required to establish a gift, by a person since deceased, against his estate.*

The rule that claims against the estate of a decedent must be established by clear and convincing proof applies with particular force where an attempt is made to establish an alleged gift by the decedent.

APPEAL by the defendant, Johanna Carpenter, as administratrix, etc., of Charles E. Carpenter, deceased, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Schenectady on the 20th day of August, 1902, upon the decision of the court, rendered after a trial before the court without a jury at the Schenectady Trial Term, adjudg-

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ing a certain bond and mortgage to be a part of the estate of Lydia J. Robinson, deceased.

John Carpenter owned a certain bond and mortgage given by one Schoppmier for \$12,000. As mortgagee therein he assigned it to his daughter, Lydia J. Robinson, and his wife, Lydia J. Carpenter, in June, 1879. The wife died in October, 1880, intestate, leaving as her only next of kin the said daughter, Lydia J. Robinson, and a son, Charles E. Carpenter. No administration was ever had upon her estate, but had her interest in the mortgage been divided among her next of kin, the said Charles would have been entitled to one-half thereof, being a one-fourth of the whole mortgage, and his sister, Mrs. Robinson, the other one-half, giving her three-fourths of the whole mortgage. Charles E. Carpenter died, intestate, in December, 1896, and the defendant herein is his administratrix. Mrs. Robinson died, intestate, on February 10, 1901, and the plaintiff is her administrator.

The plaintiff claims that some time in 1883, Charles E. Carpenter, by verbal assignment, transferred all his interest in such mortgage to Mrs. Robinson and then delivered to her the bond and mortgage, which at that time was in his possession. The defendant denies this and claims that one-fourth thereof belonged to Charles E. Carpenter at the time of his death. The action is brought to obtain an adjudication that the whole of such bond and mortgage belongs to Mrs. Robinson's estate and that the administratrix of Charles' estate should assign the same to her administrator. The trial judge decided that Mrs. Robinson, at the time of her death, owned the whole of such bond and mortgage, and that Charles E. Carpenter in 1883 had assigned his interest therein to her, and that the plaintiff, as administrator of Mrs. Robinson's estate, had the right to collect the amount still due upon such bond and mortgage and to give a good discharge for the same. Judgment thereon was entered accordingly, and from such judgment this appeal is taken.

*E. C. Angle*, for the appellant.

*John D. Miller*, for the respondent.

PARKER, P. J. :

The argument for the plaintiff in this case is substantially as follows: In 1879 the bond and mortgage in question became the prop-

erty of Mrs. Robinson and her mother, Mrs. Carpenter. From that time down to 1880, when the mother died, Charles E. Carpenter, her son, received for her payments of interest on the mortgage, and indorsed them thereon; that afterwards, until March, 1883, he held the bond and mortgage and received and indorsed the interest thereon, presumably in his own right as a successor to one-half of his mother's interest therein; that in March, 1883, when the mortgagor came to pay him for that year, he stated that he did not own the mortgage, that it then belonged to Mrs. Robinson; and he then went to her house with the mortgagor, and that payment was made to her instead of to him; that thereafter until her death in 1901, all payments of interest, and a considerable amount of principal, were made to Mrs. Robinson without objection on his part. From these facts is deduced the conclusion that he had, at some time prior to March, 1883, assigned all his interest in such mortgage to her and had delivered to her the possession thereof. It is evident that this claim proceeds upon the theory that such transfer was a gift. There was concededly no written assignment. There is not the slightest proof of any consideration for such an assignment, nor of any agreement between them concerning the assignment. The claim simply is, that whereas for two years subsequent to the mother's death Charles had possession of the bond and mortgage, yet in March, 1883, it was in Mrs. Robinson's possession and he then stated that it was her property, hence he must have previously assigned his interest therein to her, and delivered into her possession the instrument itself as evidence of such gift. Without discussing whether such facts, if established, would be sufficient to justify such a conclusion, the trouble is that no such facts are proven.

The only witness on the subject is the mortgagor. He distinctly states in his evidence that he cannot remember the year in which Charles said he could not take the money, that it belonged to Mrs. Robinson, but he is apparently quite certain that it was the first time he went to pay money after Mrs. Carpenter's death. He says: "I am not sure what year it was that I went to pay to Mr. Carpenter and he told me not to pay him. I can't tell just what year. That was the first time Mrs. Carpenter was dead. That first time I came and wanted to pay the money. Then Charley say, 'I can't

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take any money,' I have to pay to Mrs. Robinson. 'I have to pay it in there.' "

And again, when being asked if he did not tell the attorney the day before that Charles said he would divide with Mrs. Robinson, he says: "I can't tell you. You was on the road and I told you the *first time* I came he said I have to pay it to Mrs. Robinson, and he go along with me and I pay it there."

It is further clear that such transaction was not in 1883, for the witness says that the *next year* after that he paid more money to Mrs. Robinson at Mr. Thomson's office. Now, on the bond is an indorsement of March 31, 1883, of \$2,190, and an entry thereon that \$10,000 is still unpaid, and that thereafter interest is to be paid at the rate of five per cent. This indorsement is signed by Mrs. Robinson, but the statement itself is evidently the work of a lawyer. It is clearly the time when the payment was made at Mr. Thomson's office, which, as the witness says, was the year after Charles went with him to Mrs. Robinson's.

According to the evidence, then, Charles did not after his mother's death keep the mortgage as his own. Clearly he did not thereafter receive more than one payment of interest thereon, and the weight of evidence is, that on the *first* offer of interest after her death, he declined to receive it and took the mortgage to Mrs. Robinson, who was then the only one who could rightfully receipt for it. This was but a correct recognition of the legal status of the matter as it then was. Prior to that time he had acted for his mother, who owned half the mortgage, but she now being dead and no administrator having been appointed, Mrs. Robinson was clearly the only one to whom the payment should then be made.

Clearly he did not own the mortgage; he never had owned it, and his statement to the effect that it was Mrs. Robinson's, and not his, by no means indicates that she had acquired any interest whatever from him. Such a statement then made, and a delivery by him of the bond and mortgage over to her, is entirely consistent with his continued ownership of his share in the distribution of his mother's estate, including the mortgage so left by her. He gave it to her because there being no administrator appointed, she was the *only* one entitled to hold it, and he said it was hers and not his, because she owned one-half thereof and he did not own, and never

had owned, any part thereof. This is especially clear if, as Schoppmier says, it was the first payment after his mother's death. Yet the same inferences follow if he held it until he had got the interest due in 1881 thereon. Under these conditions, the inference which the plaintiff would draw from his statements and act cannot be tolerated.

Moreover, it is proven by the defendant's witnesses that on several occasions after Mrs. Robinson had acquired this mortgage, and as recently as in 1895 or 1896, she had promised Charles to settle up about the "Schoppmier mortgage." Her language was: "We will settle it as soon as I feel able now." Again on another occasion he asked her as follows: "Don't you think that mortgage ought to be settled before something happens to one of us?" To which she replied: "I do." "Well," he says, "Why don't you?" She replied: "I intend to." There is other evidence on the part of the defendant, showing that Mrs. Robinson recognized her liability to settle with Charles about this mortgage, and so negating the claim that he had assigned his interest therein to her.

The plaintiff seeks in this action to establish a *gift* from Charles to his sister of his interest in this mortgage. Not only is there an utter lack of evidence to prove such a gift, but there is strong evidence indicating that none such had ever been made.

The familiar rule that claims against the estate of a deceased party must be established by clear and convincing proof controls this case against the plaintiff. (*Matter of Van Slooten v. Wheeler*, 140 N. Y. 633.) And particularly is this rule applicable where the effort is to establish an alleged gift. (*Tilford v. Bank for Savings*, 31 App. Div. 565.) Without discussing the other objections to which the appellant's counsel calls our attention, I conclude that this judgment must be reversed upon the ground that the evidence falls far short of establishing the plaintiff's claim.

All concurred.

Judgment reversed on law and facts and new trial granted, with costs to appellant to abide event.

LOUISA GORDON and JOSEPH GORDON, as Administrators, etc., of  
JOSEPH GORDON, JR., Deceased, Respondents, v. EUGENE L.  
ASHLEY, Appellant.

*Negligence — liability for injury from an electric wire maintained in connection with an electric plant owned by a corporation — the corporation's vendor is not liable on the ground that the plant was under his control — a verdict against him rendered on that theory cannot be sustained on the theory that he erected a public nuisance.*

Eugene L. Ashley, who had made a contract to light a village with electricity and had built a plant for that purpose, sold the plant to a corporation of which he became the president and the holder of a large majority of its capital stock. The sole relation between Ashley and the corporation, so far as appeared, was that of vendor and vendee, and from the time of the transfer to it the corporation, with the consent of the village, operated the plant and performed the lighting contract. After such transfer a man was killed by coming in contact with an electric wire which had been negligently maintained in connection with the electric plant.

*Held*, that Ashley could not be charged with liability for the accident on the ground that he was in control of the plant, notwithstanding that, under his contract with the village, he had no right to assign the contract to the corporation without the consent of the board of trustees evidenced by a resolution, and that such resolution was not passed until after the accident.

A verdict, rendered on the theory that Ashley was in control of the plant, cannot be sustained on the theory that he erected a public nuisance, where no such claim was made in the complaint and no such question was submitted to or passed upon by the jury.

APPEAL by the defendant, Eugene L. Ashley, from a judgment of the Supreme Court in favor of the plaintiffs, entered in the office of the clerk of the county of Washington on the 18th day of May, 1901, upon the verdict of a jury for \$4,000, and also from an order entered in said clerk's office on the 18th day of May, 1901, denying the defendant's motion for a new trial made upon the minutes.

*Richard Lockhart Hand*, for the appellant.

*Lewis E. Carr* and *Edgar Hull*, for the respondents.

PARKER, P. J.:

If there is any charge at all in this complaint that the defendant's negligence caused the death of the plaintiffs' intestate, it is

that he negligently *maintained* the wire in question. It is the use of the wire that is complained of. No suggestion that the defendant had created a nuisance in a public place, which had resulted in the death of the intestate, can be found, and the case was sent to the jury on the former theory only. They were substantially told that unless the defendant had personal effective control of the electric light plant at the time of Gordon's death so that it was his legal duty at his own expense to keep it in proper order, and that unless Gordon died from an electric current coming from a wire controlled and operated by the defendant, then the defendant was *not* liable for such death and the plaintiff could not recover.

This statement enunciates the rule of law upon which we must assume the jury acted, and which must control our decision upon this appeal.

The serious question presented, therefore, is whether the evidence warranted the conclusion which the jury reached, that the defendant Ashley had any such control and management of the plant at the time of Gordon's death.

Ashley had taken a contract with the village of Whitehall to light it with electricity for five years, and he had built the plant in question. This contract was taken in February, 1898, and the plant seems to have been in operation some time in May of that year. It is manifest that, from the start, it was contemplated that a corporation should be formed to take and operate the plant, and in June, 1898, a corporation under the name of the "Kanes Falls Electric Company" was fully organized, and from that time the plant was actually operated by such company. The defendant testified that immediately upon its organization he sold and transferred to such company all of such plant and took stock of such company in payment therefor. There is no evidence contradicting such statement; undoubtedly the company thereafter received all the earnings of such plant, including payments from the village due for lighting it under its contract with Ashley. The stock seems to have been duly transferred to Ashley in payment therefor, and I think it clear that, under the evidence, the company, after June, 1898, must be deemed the owner as well as the operator of the plant. There is no evidence whatever suggesting any control or relation between Ashley and the company other than that of vendor and vendee.

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There is no claim that the corporation was used as a pretense or cover by Ashley to avoid responsibility. The trial judge substantially told the jury that it was organized in good faith, and, in his opinion delivered upon denying the motion for a new trial, he treats it as an independent legal entity and thinks that this action might have been properly maintained against it. There is no suggestion in the evidence of any arrangement between Ashley and the company, whereby it was to act for him, or as his agent or employee, in lighting the village of Whitehall. It was a sale, and nothing but a sale, of the plant to the company. The company employed Parsons as its electrical engineer and West as its general manager, and I am of the opinion that the clear weight of evidence is to the effect that, at the time Gordon was killed, the company owned the plant and that it alone was operating it. That being so, the jury were clearly without warrant in concluding that Gordon died from the effects of electricity passing through a wire "controlled and operated by" Ashley, or that Ashley had the "personal effective control of the electric light plant," and so they were not warranted under the law of this case, as submitted to them by the court, to render a verdict for the plaintiff.

It is urged that Ashley had no right, under the terms of his contract, to assign his rights under it, without the consent of the board of trustees evidenced by a resolution to that effect, and that such resolution was not passed until after Gordon was killed. True. But nevertheless the company did purchase all the plant, and even if it thereby acquired no *right* to operate it in Whitehall, nevertheless it did actually operate it with the constant consent of the village. It is a distortion of the evidence to argue that because Ashley was so forbidden to sell, it must be assumed that the company was acting for him and was at all times under his control. No such arrangement was made between Ashley and the company, and, as a matter of fact, the village knew that the company was operating the plant, consented to such action and paid it for so doing. The rights, as between the village and Ashley or the company, under that contract, do not affect the question as to who had control of the wire that caused the death of Gordon. Nor does the fact that Ashley was president of the company and held a very large majority of the stock control that question. Whatever authority he had,



or whatever act was done in that relation, was the act of the company, and for any negligent omission in that relation the company alone would be liable.

The trial judge has sustained the verdict upon the theory that Ashley erected a public nuisance by suspending this wire in the manner in which it was suspended, and that, therefore, he was liable for all injury resulting from its use.

It is sufficient to say that no such claim has been made in the complaint; no such fact has been charged against him therein, and no such question has been submitted to or passed upon by the jury. Whether the defendant could be held liable had the action been brought and tried upon such a theory, is not now before us. Upon the evidence appearing in this record I have very great doubts whether such a claim could be sustained, but it is sufficient here to say that we do not now consider it.

For the reasons above stated the judgment and order must be reversed and a new trial granted.

All concurred.

Judgment and order reversed on law and facts and new trial granted, with costs to appellant to abide event.

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E. BROWN BAKER and ALBERT M. BANKER, Appellants, v. THE  
STATE OF NEW YORK, Respondent.

*Improvement of the Erie canal under the act of 1895—it was abandoned, not suspended—the State was not authorised by the contracts to abandon it—right of the contractors to recover damages for the breach.*

The action of the State of New York, upon and after the 14th day of May, 1896, in reference to the work of improving the Erie canal, which had been undertaken pursuant to chapter 79 of the Laws of 1895, was an abandonment of the work and not a mere "suspension" thereof within the meaning of a clause in the contracts for a portion of the work which provided that if the execution of the contracts should be suspended by the State at any time for any cause, no claim for prospective profits on work not done should be made and allowed, but that the contractors should complete the work when the State ordered its resumption.

The right to abandon the work before completion without incurring any liability to the contractor for prospective damages was not reserved to the State under a

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provision of the bid upon which the contract was founded, by which the contractor offered "to construct and to finish, *so far as the superintendent of public works shall direct*, all of the work to which prices are affixed in the above schedule in all respects according to the contract and specifications," or by a provision in the contract that the work should be "prosecuted at the times and in the manner directed by the resident engineer" or by a clause in the specifications providing, "the State reserves the right to increase or diminish the amount or amounts of any class of work from the amount shown on the bidding sheet," and that in that event the amount of work *required* would be done at the rates named in the contract, and no claim for damages or prospective profits would be made on account of such change.

The abandonment of the work entitled the contractors to recover the money deposited by them as security for the faithful performance of the contracts and the balance due for work actually done thereunder, and — assuming that the aggregate of all the bids for the work was within the \$9,000,000 authorized to be expended upon the improvement and that, at the time of the execution of the various contracts, the \$9,000,000 was apportioned to the several contractors up to the amount of their respective bids — each contractor would also be entitled to recover such prospective damages, not exceeding the amount of his bid, as he could show that he had suffered by reason of the abandonment of the work.

APPEAL by the claimants, E. Brown Baker and another, from a judgment of the Court of Claims, entered in the office of the clerk of said court on the 4th day of March, 1902, "both upon questions of law and of fact, and for an insufficiency of the judgment, upon the grounds that the said judgment, insofar as it limits claimants' recovery to \$5,100, the amount of the deposit, with such interest, to be computed by the Comptroller, as it has earned the State, and does not allow interest thereon at the rate of six per cent. per annum from the 14th day of May, 1898, and to \$8,888.23, the balance due for work performed and materials furnished, and does not allow a recovery of \$24,277.50 in addition thereto as damages for the breach of the contract on the part of the State of New York, and the interest thereon from the 14th day of May, 1898, and makes the recovery allowed conditional upon the claimants surrendering their contract described in their claim herein and releasing the State from all liability on account thereof within thirty days from the service upon them of a certified copy of this judgment, and further orders and adjudges that in case the said claimants shall not surrender said contract and file such release

within said thirty days, then the State of New York has judgment against the claimants dismissing the said claim, is against the evidence and the weight of evidence and contrary to law; and upon the further ground that the Court erred in holding and determining that the State is not in default, and that it simply lessened the amount of work to be done by the claimants up to the present time and has suspended the execution of the contract."

The contractors presented to the Court of Claims a claim against the State for damages alleged to have arisen out of a breach of a contract in which they had undertaken to do certain specified work in enlarging the Erie canal. They claim that the State had abandoned the work and prevented the complete performance thereof by them, whereby they had lost the profits which they would otherwise have derived, and also that they thereby became entitled to be paid the amount still unpaid for work actually done under such contract, and the amounts deposited with and retained by the State as security for its complete performance. The claim was denied by the court below as to the damages claimed, but they were given a judgment for the moneys earned and for those retained as security, provided they would release all further claim against the State on account of such contract or its breach. From such judgment the contractors have appealed.

*Andrew J. Nellis*, for the appellants.

*John C. Davies*, Attorney-General, and *George H. Stevens*, for the respondent.

PARKER, P. J.:

The contract, for the breach of which this claim is made against the State, provides, in substance, that, if the execution of the contract shall be suspended by the State at any time for any cause, no claim for prospective profits on work not done shall be made and allowed, but the contractors shall complete the work when the State shall order it to be resumed, and the date of such completion shall be fixed by the Superintendent of Public Works. It is claimed on the part of the State that the breach complained of is but a "suspension" under the above provision. If such claim is correct, it is plain that not only could no prospective profits be now claimed as

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damages, but neither could the sums which, by the terms of the contract are to be retained until the completion of the work, be now demanded. No breach of the contract would have occurred, nor would such sums have yet become due.

But I am of the opinion that the action of the State upon and after the 14th of May, 1898, was an abandonment of the work referred to in the contract instead of a mere "suspension" thereof. The contract was then terminated by the State, and the contractors were notified to that effect. No suggestion was made that the work provided for in the contract was to be thereafter completed, or that any time would be thereafter fixed for its completion.

They were simply notified that the work was to cease, and operation under the contract was then brought to an end. Chapter 544 of the Laws of 1899 seems to be a declaration on the part of the State that it so considered the situation, and that if the contractors were willing to adopt that view and take what was due them *upon their contracts* and release all further claims, they would be paid upon that basis, including all moneys held by the State as security for the performance of the contract on their part. A clear abandonment of the scheme to improve the canal to the depth of nine feet is here shown; and it is very apparent that the breach of which the appellants complain is not the mere suspension above referred to.

We have then this situation: The contractors institute against the State these proceedings for a breach of its contract, and they claim not only the amounts due for work actually done by them thereunder, but also such damages as have naturally accrued to them on account of such breach. The amount still unpaid for work actually done is conceded to be \$8,881.23; and the amount of money deposited with the State as security for the work is conceded to be \$5,100. It is also conceded that, so far as they were permitted, the contractors have well and faithfully performed the work. The State having abandoned the work and prevented further performance on the part of the contractors, it is clear that both the sum of \$5,100 and the \$8,881.23 are due and payable by it to the contractors; and under this view of the case, it is difficult to see why they should not recover them untrammelled by a provision in the judgment that they release all further claim for damages against the State.

But the further claim that the contractors make in this proceeding, that they are entitled to recover the profits which they would have made had the work proceeded to full completion under the contract, is not so clear.

On the face of the contract, and on the proof disclosed by the record before us, the total work which the contractors undertook to perform was, it seems to me, to "construct and to finish" the improvement of a certain specified five and eighty-seven one-hundredths miles of the Erie canal according to plans and specifications submitted with and made a part of the contract. Such is their undertaking in the first provision of the contract. No change in such plans and specifications has ever been made by the State, and it is conceded that when abandoned such work had not been completed.

Such being the obligation on the part of the contractors, it would seem, from the proof disclosed by the record, that the reciprocal obligation on the part of the State to permit them to prosecute the work to completion, and to pay them for the same, exists, unless the State has reserved to itself the right to end the work at any period of its progress. If such right is reserved, undoubtedly, no loss of profits could be claimed as damages for a breach of the contract, because in that case there would be no breach. The court below has substantially held that such is the situation here, and has, therefore, rejected the contractors' claim for such damages. If the solution of the question depends upon the construction of the terms of the contract alone, a careful study of that instrument will force the conclusion that no such reservation can be found within it.

Notice that bids for the performance of the work upon the five and eighty-seven one-hundredths miles covered by this contract would be received was published. Accompanying that notice, the plans, specifications and statement of the engineer's estimate for the work to be done thereon were submitted and filed as required by chapter 794 of the Laws of 1896 (amdg. Laws of 1895, chap. 79, §§ 4, 5). Under such notice and statement these claimants made a bid and affixed their prices per yard and per foot to the several estimated amounts of excavation, construction or material contained in such statement. They were awarded the work, and thereupon entered into the contract which is set forth at length in the appeal book. By such contract, such plans, specifications and statement are made

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a part of the contract. By such statement the total cost of the work and materials to be done and furnished, less value of old materials furnished by the State, amounted, at the agreed prices, to the sum of \$98,760. The work done and materials furnished by the contractors up to the time the work was stopped amounted to \$75,886.23. It is proven in the case that most of the estimated amounts given in such "statement" fell far short of the *amounts* actually necessary to finish the work according to the plans and specifications referred to in the contract. The total cost of such work, at the agreed prices, would amount to \$165,953.75. Thus, at the time the work was abandoned, there was still unperformed and unfurnished of the *estimated* work and materials an amount equal to the sum of \$22,873.77, and of the amount necessary to complete the actual work required an amount equal to \$90,067.52.

There are several provisions in the contract, specifications and statement which it is claimed amount to a reservation by the State of the right to terminate at any time it desired the work under this contract. *First.* In the *bid* which is written and signed by the contractors, at the foot of the "statement" of estimated amounts, etc., they offer "to construct and to finish, *so far as the superintendent of public works shall direct*, all of the work to which prices are affixed in the above schedule in all respects according to the contract and specifications, etc., \* \* \* this day exhibited. \* \* \*" But this *offer* is no part of the contract and it is to be noticed that in the contract their undertaking is to do all the labor, etc., necessary to "*construct and to finish* in every respect" the five and eighty-seven one-hundredths miles in question, and such work is to be done according to the plans and specifications furnished, etc. Here is a distinct undertaking on the part of the contractors to finish the contract according to the plans, and there is no provision or suggestion here that they are to do that work or so much thereof as the Superintendent of Public Works shall require. Under the contract they are required to do it all. And the mutual obligation on the part of the State to permit them to do it all and to pay them accordingly is not in any way limited by any provision here made. The limitation suggested in the offer is not incorporated into the contract.

Moreover, if such *offer* is to be deemed a controlling part of the contract, then the contractors' obligation to do work would extend

only to the amounts specified in the various classes named in the statement under which it is written, for the language there used is to do "all of the work to which prices are affixed in the above schedule," etc.

It will hardly be claimed that either party expected that no more work should be done than was specified in that estimate, inasmuch as the contractor is distinctly notified that the quantities there named are "approximate only," and the provision of the contract headed "Alterations and Directions," etc., and the 28th specification, hereinafter referred to, are utterly inconsistent with that theory. So, also, the contractors in several instances did more work than was specified in the estimate, thus indicating that the parties understood that the amount of work to be done was not limited by that estimate.

In all these respects the offer differs materially from the *contract* and cannot be deemed to modify or control it.

There are certain other provisions in the contract in which it is required that the work shall be "prosecuted at the times and in the manner directed by the resident engineer," etc. These have reference to the method of carrying on the work, and clearly were not intended to provide that the resident engineer might at any time order an abandonment of the work.

It was further provided in section 28 of the specifications that ~~"the State reserves the right to increase or diminish the amount or amounts of any class of work from the amount shown on the bidding sheet," and in that event the amount of work required will be done at the rates named in the contract, and no claim for damages or prospective profits shall be made on account of such change. It is insisted that this amounts to a reservation by the State of the right to cease the work at any time, without incurring any liability for damages. The argument seems to be that, under this provision, the State might diminish the amount of each class of work specified in the estimate or "bidding sheet" to little or nothing, and in that manner abandon the work long before its completion.~~

~~The whole scheme of the contract repels the idea that such was the purpose, or understood meaning, of this provision.~~ The "bidding sheet," to which it refers, was the estimate of quantities, etc., required by the statute above cited to be made by the engineers

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and submitted with the notice for bids. These quantities were approximate only. The contractors were so notified, and directed to ascertain such quantities for themselves (see page 24 of the appeal book), and the real purpose of section 28 was to protect the State from any claim for damages, or prospective profits, should it turn out upon completion of the work that the quantity of any class therein described varied from that given in such schedule. It was a mere declaration that the quantities specified in that preliminary estimate were not to be controlling upon the State. That estimate having been named in the first provision of the contract as a part of the contract, it was deemed necessary for the State to repel the possible inference that only such work as was therein specified would be required, and hence the provisions of section 28 were inserted. The idea that the completion of the work might be prevented, or evaded, under this provision never occurred to either party.

Had the real agreement between the parties been to the effect that the contractors should do all the work necessary to complete the improvement of this section of the canal, *or so much thereof only as the State should require*, it is fair to assume that such a provision would in *plain and distinct terms* have been inserted in the contract itself. In view of its absence and of its great importance, had such been the agreement, I am of the opinion that the several disconnected, indefinite and inconsistent provisions which the State now relies upon should not be construed into such a reservation. If the State is correct in its claim as to the construction of the contract, these contractors were obligated to perform work and furnish materials that, at agreed prices, would amount to at least over \$98,000, and possibly much more; while the State might have ended their operations before they had earned enough to pay the expenses incurred in preparing for the work. Such an agreement is not usual and should not be inferred from language no more explicit than is to be found in this contract.

I have given so far only what seems to me a fair construction of the terms of the contract as it reads, and if it can be shown that such a contract was authorized I see no way by which the State can avoid payment of damages for its breach. But there are other considerations which are barely suggested by the record and by the



arguments which to my mind have a very serious bearing upon the proper conclusion to be reached in the premises. Until we are furnished with a record which discloses all the material facts bearing upon the question of the authority of the Superintendent of Public Works to make a contract in terms like the one before us we shall not have sufficient data for a proper determination of the matter.

It must be admitted, I think, that the Superintendent of Public Works had no power to create a contract debt on the part of the State beyond the \$9,000,000 voted by the People under section 4, article 7 of the Constitution. Nor had the State the power to authorize the creation of a debt beyond that sum. Hence it would seem that if the aggregate of the contracts let contemplated the expenditure of a greater sum, then as to such excess they are not enforceable against the State. It would, perhaps, seem plainer if the entire improvement was under a single contract. No one, I apprehend, would then say that a contract involving an indebtedness of \$20,000,000, where a debt of only \$9,000,000 was authorized, could be enforced beyond the \$9,000,000 appropriated. This seems to have been clear to the Legislature in conferring upon the Superintendent of Public Works the power to contract. The Legislature intended to keep within its constitutional powers, and did not intend that the aggregated contracts should involve the making of improvements beyond the sum voted by the People. This is plain from the reading of the act of 1895 (Chap. 79) and the act as amended in 1896 (Chap. 794). By the amendment of 1896 it was provided that "None of the work called for by this act shall be contracted for until the State Engineer shall have ascertained with all practicable accuracy the quantity of embankment, excavation, masonry, the quantity and quality of all materials to be used *and all other items of work* to be placed under contract, and a statement thereof, with the maps, plans and specifications, corresponding to those adopted by the Canal Board and on file in the office of the State Engineer, is publicly exhibited to every person proposing or desiring to make a proposal for such work. *The quantities contained in such statement shall be used in determining the cost of the work.*" The act then provides for filing the proper maps, etc., with the State Engineer, and that no alteration shall be made in the specification or the plan of any work under contract during its progress, except an

approval of such alteration be in writing signed by the parties. "No change of plan which shall increase the expense of any such work, or create any claim against the State for damage arising therefrom, shall be made," unless a written statement is submitted to the Canal Board and its assent is obtained.

It is here contemplated that the bids should be for specific work, and the price bid should determine the *cost of the improvement contracted to be done*. Safeguards are provided against any increase over the sum bid, and, if these directions were adhered to, it was reasonable to suppose that the aggregate of the sums bid would fairly determine the whole cost of the entire improvements contracted for. If the aggregate of these bids was within the \$9,000,000, it would seem that the contracts up to the bids made on each would have been authorized. I assume that such was the fact, to wit, that the aggregate of these bids was within that sum, though this record shows nothing on the subject. If the sum of these bids practically exhausted the \$9,000,000, I do not see how there remained any room for expansion in any contract, and the elastic quality in the direction of increase over the sum bid in any contract would seem under this theory to have been prohibited. I deduce from this that the \$9,000,000 was, at the time the bids were accepted and contracts entered into, divided up and to each contract was apportioned the sum stated in the bid, which the law said should determine "the cost of the work;" and if the contract in terms contemplated the expenditure of any sum beyond the sum so apportioned, it was to that extent unauthorized. For the same reason it would seem also that if any sum has been paid to any contractor beyond the sum bid, such payment was unauthorized, because there was no fund from which it could be lawfully paid; and it could not be properly taken from the sum apportioned to any other contractor. If we are right in this theory of an apportionment of the \$9,000,000 to the several contractors up to the amount of their bids, we are lead to the conclusion that each contract was binding upon the State up to the amount of the bid and not beyond — provided, of course, that the aggregate of the bids did not exceed \$9,000,000 — and that any abandonment by the State of any contract before the amount of the bid had been exhausted was a breach and entitled the contractor to prospective profits for work undone up to the amount

of his bid and no more. A retrial of this case will doubtless develop the necessary facts suggested and made necessary to the record for a proper disposition of the claim. Section 10 of article 7 of the Constitution cannot here be invoked to give legality to the contracts made under the \$9,000,000 act. There does not appear to have been any money in the treasury applicable to the improvements contemplated, nor did the Legislature appropriate any money from the treasury. The Legislature might levy a tax and appropriate money for improvements contemplated to be made, but this clause does not authorize the creation of an indebtedness nor the raising of money to pay an unauthorized indebtedness; otherwise the limitation of section 4 of this article of the Constitution might be made wholly inoperative.

Our conclusion that the contract has been abandoned on the part of the State entitles the claimants to a judgment for money conceded to be due for the work actually done, and for the sum deposited as security for performance of the contract. And if the facts shall prove to be, what it has been suggested that they really are, viz., that the aggregate of the contracts upon their face, as shown by the estimates and bids, was not in excess of the \$9,000,000 voted, the plaintiffs may be entitled to such damages as they can show that they have suffered by reason of the abandonment on the part of the State before the sum of \$98,760, the amount of plaintiffs' bid on the estimate presented, was exhausted.

The judgment of the Court of Claims is reversed, with costs, and a new trial before the Court of Claims is directed.

All concurred.

Judgment of the Court of Claims reversed, with costs, and a new trial before the Court of Claims granted.

JOSEPH W. MERCHANT and Others, Respondents, v. NETTIE M. WHITE, Appellant.

*Insurance — payable to heirs at law — a child taken into the family is not included therein.*

A child, taken into a family and brought up therein as a child of the family without a formal adoption, is not entitled to share in the proceeds of an insurance policy issued upon the life of her foster father and payable to his heirs at law.

APPEAL by the defendant, Nettie M. White, from a judgment of the Supreme Court in favor of the plaintiffs, entered in the office of the clerk of the county of Broome on the 15th day of March, 1902, upon the decision of the court rendered after a trial before the court without a jury.

This action was originally brought by the plaintiffs, who are the heirs at law of Morris R. Merchant, who died intestate in 1900, against the North Western Mutual Life Insurance Company, to recover upon a policy of insurance issued upon the 8th day of April, 1865, insuring the life of the said Morris R. Merchant for the sum of \$5,000. The policy recites that it is in consideration of \$140.40 to them in hand paid by Mary A. Merchant, wife of Morris R. Merchant, and that it is for the sole use of the said Mary A. Merchant. The covenant is to pay to her, or, if she should be dead before the death of Morris R. Merchant, that the amount of the insurance should be paid to the heirs at law of the said Morris R. Merchant. Mary A. Merchant, the wife of Morris R. Merchant, died in 1887. This defendant also made claim to the proceeds of the said insurance policy, claiming both as an adopted child of the said Morris R. Merchant and also by reason of a contract claimed to have been made by the said Morris R. Merchant with her mother, at which time Morris R. Merchant was given the custody and services of said child; and it is claimed that in consideration thereof he agreed to treat her as his own child and to make her his heir. By an order, the moneys were paid into court and the defendant was interpleaded, and the action was brought to trial upon supplemental pleadings alleging the different claims of the plaintiff and

the defendant to the said moneys. Further facts appear in the opinion.

*H. D. Messenger*, for the appellant.

*T. B. Merchant* and *L. M. Merchant*, for the respondents.

SMITH, J. :

The court below has impliedly found that when Morris R. Merchant took the appellant to his home, he made no agreement by which he was to make her his heir or to give her any or all of his property. The only evidence of the agreement itself, aside from the declarations of Morris R. Merchant, is found in the evidence of Anna Smith and Major Smith, her husband, an aunt and uncle of the appellant, who swear to the details of a conversation occurring thirty years prior to the trial. It is hardly possible that the terms of such an agreement can be so long remembered or anything more be retained than an impression of what were to be the relations between Morris R. Merchant and this appellant. The agreement is claimed to have been made with the mother, while the father was still living. It is not claimed that he gave any assent thereto at that time. The mother died in 1871. In 1873 the father signed a paper which consists of a transfer to Morris R. Merchant of the custody, tuition and services of the appellant during the term of her minority, and an authorization to change the appellant's name so that she may bear his name. Both the claimed contract of adoption and this transfer by the appellant's father were made before there was any statute in this State authorizing the adoption of a child. It is true that an agreement by Merchant to make the child his heir, although verbally made, might be valid, and it would be no objection that such was not contained in the instrument of transfer signed by the father. The fact, however, that the instrument of transfer signed by the father recited by that it was upon consideration of one dollar, and made no reference to this claimed agreement on the part of Merchant to make the appellant his heir, is some evidence against the making of such an agreement, and the fact that the transfer should continue during the minority of the appellant is further evidence that there was no intention of establishing a permanent relation of father and child as between Mer-

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chant and the child. Merchant's wife, who was then living, does not seem to have assented or in any way agreed to become a party to any adoption. By the Adoption Act of 1873 (Chap. 830, § 3), thereafter enacted, it was provided that a married man, not lawfully separated from his wife, could not adopt a child without the consent of his wife. There is further evidence by the witness Killeen and the witness Weaver of declarations of Morris R. Merchant as to his intentions to make the appellant his heir. Upon this question our minds are not entirely free from doubt. But appellant must establish such an agreement by a preponderance of evidence. The trial court has found the fact against her. A reversal of that finding is not warranted by the evidence.

It is not claimed that the appellant was formally adopted by Morris R. Merchant so as to come within the strict definition of a legal heir. While she assumed the name of Merchant, and was brought up in the family as a child, we are referred to no authorities which hold those facts sufficient to give her the status of a legal heir, even in the interpretation of insurance policies made for the benefit of families. Such contracts are given a liberal interpretation to secure the purpose of the insurance as a provision for the support and maintenance of a family. When, however, the contract of insurance makes the amount payable to the legal heirs of the assured, it would be doing violence to the contract rights of such heirs to interpret the policy for the benefit of a child taken into a family and brought up as such without a formal adoption by which alone the appellant could have been made the heir of the insured. We have carefully examined the very able brief of the appellant's counsel, which, as we deem, falls just short of establishing the appellant's rights either upon the law or the facts. We think the judgment should, therefore, be affirmed.

Judgment unanimously affirmed, with costs.

MARY LOUGHRAIN, as Executrix, etc., of PETER LOUGHRAIN, Deceased,  
Respondent, v. THE AUTOPHONE COMPANY, Appellant.

*Negligence— injury to a truckman by reason of his horse being frightened by a box falling, while being lowered, into his wagon— a question is presented for the jury — effect of the horse not being fastened— the person lowering the box is not a fellow-servant of the truckman.*

In an action to recover damages for personal injuries, it appeared that the plaintiff was a truckman who had entered into a contract with the defendant, a manufacturing corporation, by which he agreed to transport freight from the defendant's factory to the freight office and from the freight office to the defendant's factory for a specified sum per year; that the freight delivered to the plaintiff at the defendant's factory was usually lowered to him from an upper window by means of a rope and pulley; that on the occasion of the accident, while the plaintiff was standing in his wagon for the purpose of receiving a number of boxes which were being lowered to him and of guiding them into the proper places in the wagon, the boxes fell, owing to the fact that they had not been securely fastened; that they did not strike the plaintiff in their fall, but frightened the plaintiff's horse, which was not fastened, and caused him to run away, throwing the plaintiff out of the wagon and injuring him.

*Held*, that the questions of the defendant's negligence and of the plaintiff's freedom from contributory negligence were properly submitted to the jury and that a judgment entered upon a verdict in favor of the plaintiff should be affirmed;

That, as the horse was a kind and gentle one and the lines were within easy reach of the plaintiff and could easily be caught by him except for the sudden jump of the horse, it could not be said that the plaintiff's failure to hitch the horse constituted negligence as a matter of law;

That the servant of the defendant whose negligence caused the boxes to fall was not a fellow-servant of the plaintiff.

APPEAL by the defendant, The Autophone Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Tompkins on the 16th day of December, 1901, upon the verdict of a jury for \$850, and also from an order entered in said clerk's office on the 16th day of December, 1901, denying the defendant's motion for a new trial made upon the minutes.

This action was originally brought by Peter Loughrain against the defendant for damages claimed to have been caused by the defendant's negligence. Since the trial the plaintiff has died, and his

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executrix has been substituted as plaintiff in the action. Defendant is a manufacturing corporation, manufacturing musical instruments in the city of Ithaca. Plaintiff's intestate was a truckman or baggage expressman doing odd jobs around the said city in the line of his calling. For many years he transported between the defendant's factory and the railroad freight office most if not all of the defendant's light freight, and was paid therefor by the piece. About two years before the happening of the accident which is the cause of the action, he entered into a contract with the defendant, whereby it agreed to pay him \$200 a year for the transportation of its light freight from the factory to the freight office, and from the freight office to the factory. Upon the 23d day of August, 1900, pursuant to his custom he called at the defendant's factory for freight. This freight was usually delivered to him from an upper window from which it was lowered by means of a rope and pulley. Upon the day in question in lowering the freight the boxes were not securely fastened, so that they fell. In the fall the boxes did not strike the plaintiff's intestate, but frightened his horse, causing the horse to run away, throwing the plaintiff out of the wagon and causing the injuries for which suit is here brought. The answer of the defendant denies the negligence of its servants, alleges contributory negligence on the part of the plaintiff, and alleges that the injury was caused by the negligence of a co-employee. Further facts appear in the opinion.

*Myron N. Tompkins*, for the appellant.

*P. F. McAllister*, for the respondent.

SMITH, J. :

We are of the opinion that the trial court correctly submitted to the jury the question of negligence upon the part both of the plaintiff and of the defendant. The fact that the boxes were so insecurely fastened that they fell is sufficient evidence of the negligence of the defendant to warrant the submission of that fact to the determination of the jury. The plaintiff was standing in his wagon, as he had been accustomed to do, for the purpose of receiving the boxes as they were lowered and of guiding them into the proper places in the wagon. That the horse was not hitched was not negligence as a



matter of law, as the horse was a kind one with which plaintiff's intestate had had no difficulty theretofore, and, moreover, the lines were within easy reach of plaintiff's intestate and could easily be caught by him except for the sudden jump of the horse, which he might well have failed to anticipate. There is no such preponderance of evidence, therefore, on the part of the defendant upon either question as would justify us in disturbing the verdict of the jury.

The more important question in the case arises upon the defense that the injury was caused by the negligence of a co-employee of plaintiff's intestate. It is claimed that, in the act of transporting the defendant's freight back and forth, the plaintiff's intestate was the defendant's servant, and, inasmuch as the negligence which caused the injury was the negligence of another servant, that the plaintiff assumed the risk of such negligence and has no cause of complaint against the defendant. It will hardly be claimed that if the plaintiff's intestate had upon a single retainer taken the freight from the defendant's factory to the station he would thereby become a servant of the defendant. His relation would be simply a contract relation for this specific purpose, which would have in it none of the elements which attach to the relation of master and servant. (*Murray v. Dwight*, 161 N. Y. 301.) It is very clear that in such a case the defendant would not be liable for his negligence in driving to and from the freight office. He was a common carrier and would be engaged in his business as a common carrier and not as defendant's servant. We are unable to see how the legal relation is changed by the fact that he was frequently employed, or by the fact that for such service he was to receive a gross sum, and was not paid by the piece, as was the original custom. He was at the time of the accident a common carrier, transporting light baggage and freight for any one who might call upon him therefor, and was not in our judgment a servant of the defendant, either to impose upon the defendant any liability for the acts of its servants or to save it from liability by reason of the assumed risk of the negligence of a co-employee. The case was fairly and properly submitted to the jury, and we are unable to find any reason for disturbing their conclusion.

Judgment and order unanimously affirmed, with costs.

GEORGE H. LITTEBRANT, Respondent, v. THE TOWN OF SIDNEY,  
Appellant.

*Negligence— injury from a wagon slipping down an embankment— failure to put a log by the side of the road— presence of ice on the highway— a witness who testified as to the condition of the road, allowed on his cross-examination to state how long the road had been out of repair.*

In an action brought against a town to recover damages for personal injuries which the plaintiff sustained while driving along a highway in said town in consequence of his wagon slipping down an embankment at the side of the highway, it appeared that the road was not used in winter, and that it was not frequently used in summer; that at the point where the accident occurred it was only about seven feet wide, and that the embankment descended at an angle of forty-five degrees, and that no log or other barrier had been placed upon the edge of the embankment. The accident occurred in March, and ice which had formed upon the highway was a contributing cause thereof.

It further appeared, however, that the plaintiff had no prior knowledge of the existence of the ice, and the jury might have determined that his wagon would have safely passed over this part of the road if it had not been turned aside by a stone in the upper edge of the road.

*Held*, that a judgment entered upon a verdict in favor of the plaintiff should be affirmed;

That the jury had a right to say that the failure to put a log or some other barrier upon the edge of the embankment was a failure to exercise the degree of care which the law required of the highway commissioners;

That it could not be said, as a matter of law, that the plaintiff was guilty of contributory negligence, and that that question was properly submitted to the jury;

That as a witness called by the defendant had, upon his direct examination, distinctly sworn that the road was very bad at the point in question, no harm was done to the defendant in allowing the witness, upon his cross-examination, to state how long the road had been out of repair.

KELLOGG, J., dissented.

APPEAL by the defendant, The Town of Sidney, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Delaware on the 28th day of October, 1901, upon the verdict of a jury for \$200, and also from an order entered in said clerk's office on the 28th day of April, 1902, denying the defendant's motion for a new trial made upon a case containing exceptions.

Plaintiff recovered a verdict of \$200 damages against the defendant for an injury sustained upon the 6th day of March, 1900, by reason of a defect in one of the defendant's highways. From the judgment entered upon this verdict and from an order denying defendant's motion for a new trial defendant has appealed.

*C. L. Andrus* and *Charles H. Seeley*, for the appellant.

*E. H. Hanford* and *L. F. Raymond*, for the respondent.

SMITH, J. :

Defendant urges three grounds for the reversal of this judgment: *First*, that defendant's negligence is not proven; *second*, that plaintiff was guilty of contributory negligence; and, *third*, the improper admission of testimony over defendant's exception.

We think the defendant's negligence and the plaintiff's freedom from contributory negligence were properly left to the determination of the jury. It is true that the road was not used in winter, and was not frequently used in summer. It was left open, however, as a highway of the town, and that at this place it was considered a dangerous place seems clear from the evidence. It probably was not negligent in the highway commissioner to decline to blast out the rock in order to widen the road as he was asked to do. But at this spot the road was only about seven feet wide, running to a bank from which was a descent of forty-five degrees, and a very small matter might have turned the horses so as to cause an accident. The jury had the right to say that the failure to put a log or some such barrier upon the edge of this embankment was a failure to exercise the degree of care which the law requires of the highway commissioners. Such a barrier would have averted this accident, and would have been at least a partial protection from the danger which the situation presented.

Nor can it be said as a matter of law that the plaintiff was guilty of contributory negligence. It is true that this road was blocked at one end in the winter by snow. But this was in March when the snow had practically disappeared. The night before ice had frozen upon this spot where the accident occurred which undoubtedly was a contributing cause of the accident. For an injury caused by this ice alone the town was not liable. But plaintiff was upon

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the road with some timbers in his wagon twenty feet long. Prior to this he had no knowledge of the dangerous condition caused by the freezing of this ice. He could not have turned his wagon around in the road when he came up to this spot. The jury might well have said that his wagon would have gone safely over if it had not been turned aside by a stone in the upper edge of the road which threw over the front wheels and caused the slipping which finally pulled the wagon over. Whether, under all the circumstances of the case, the plaintiff acted as a prudent man would have acted was a question from which the inferences are not entirely clear and which was within the province of the jury to determine.

The defendant complains that a witness was allowed over its objection to answer the question whether the road had been actually out of repair for a number of years before the accident. The learned court allowed the question simply as cross-examination of matter which had been brought out by defendant's counsel. The witness was the defendant's witness. Upon his direct examination he had distinctly sworn that the road was very bad at this place, and having thus characterized the road upon the defendant's examination, we are of opinion that no harm was done in allowing the witness upon his cross-examination to state how long the road had been out of repair.

The judgment should, therefore, be affirmed.

All concurred, except KELLOGG, J., dissenting.

Judgment and order affirmed, with costs.

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EVELYN G. WHITE, Respondent, v. TOWN OF CAZENOVIA,  
Appellant.

*Negligence— injury because of a horse being frightened by a log by the roadside— testimony that the log was removed to prevent other horses being frightened is incompetent.*

Where, on the trial of an action to charge a town with negligence in permitting a log of wood, which the plaintiff alleged frightened her horse, to remain on a highway running through a wooded tract in such town, one of the contested questions is as to whether or not the log of wood was "a frightful object and

was an object well calculated to alarm and frighten horses that might be driven along said highway," it is error to allow a witness (not the commissioner of highways of the town) to testify that he and his father took the log out of the road the day after the accident in order to prevent other horses from becoming frightened at it, as the question whether the log was calculated to frighten horses was a question for the jury and was not a proper subject for expert testimony.

APPEAL by the defendant, the Town of Cazenovia, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Madison on the 31st day of May, 1902, upon the verdict of a jury for \$2,000, and also from an order entered in said clerk's office on the 22d day of May, 1902, denying the defendant's motion for a new trial made upon a case containing exceptions.

*M. H. Kiley*, for the appellant.

*Wilson, Cobb & Ryan*, for the respondent.

KELLOGG, J. :

This action charges the defendant with negligence in permitting a log of wood to remain on the roadside which plaintiff alleges frightened her horse, and for not providing a barricade to an embankment upon the roadside. One of the contested questions in the case was as to the log of wood, whether or not it was, as charged in the complaint, "a frightful object and was an object well calculated to alarm and frighten horses that might be driven along said highway."

The plaintiff had proved that the log was moved the day after the accident by one Winchell to some point on the opposite side of the highway. A witness by the name of Floyd Winchell was called by defendant to describe the log as it lay at the time of the accident. No question was asked him by defendant as to removing the log. On cross-examination counsel for plaintiff asked: "Q. You and your father took the log out of the road the following day? A. Yes, sir. [Objected to as incompetent, immaterial and improper, and ask it be stricken out.] The Court: It may stand. [Exception taken.] \* \* \* Q. What did you move it for? [Objected to as incompetent, immaterial and improper.] The Court: It is cross-examination. [Exception taken.] A. Because that was the

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place where the accident occurred and that the horse got scared at it and we moved it so that there wouldn't be any more get scared at it. Defendant's counsel: We move to strike out the answer as incompetent, immaterial and improper. The Court: No. Defendant's counsel: And not a cross-examination and not a direct examination. The Court: You waited after the question was asked. The evidence is competent. I refuse to strike it out. [Exception taken \* \* \* .] Q. When did you reach your conclusion that it was the log that caused the accident? [Objected to as incompetent, immaterial and improper and assuming a fact not proven.] The Court: He may state. [Exception taken.]"

This witness was not the commissioner of highways and his acts or statements could not be used to bind or prejudice the town. He was made here to declare in substance that the log was calculated to frighten horses and where it lay was an object of danger. This is not a subject for expert testimony.

It was a serious question whether the commissioner of highways knew or ought to have known that this log at the side of the highway, in a wooded tract through which the highway passed, was an object of danger because from its appearance it was reasonable to apprehend that it would frighten a manageable horse of ordinary courage and cause him to bolt when prudently driven by. It was a question for the jury and they had no right to determine that question on such testimony as this. The testimony so taken and declared by the court as competent without limitation was an error so grave as to require a reversal of the judgment.

The other questions and exceptions it is needless to examine, since the error pointed out calls for a new trial.

All concurred.

Judgment and order reversed and new trial granted, with costs to appellant to abide event.

NICHOLAS RICHER, Respondent, v. JAMES C. FARGO, as President  
of the MERCHANTS DISPATCH TRANSPORTATION COMPANY, Appellant.

*Bill of lading—change of the destination of the merchandise mentioned therein—  
responsibility of the common carrier therefor.*

In an action brought to recover damages for the alleged negligence of the defendant in transporting a carload of eggs to New York city instead of to New Berlin, N. Y., it appeared that the defendant was a common carrier which operated no railroads but owned cars in which, pursuant to an arrangement with the railroad companies, it transported perishable property from one point to another. It did not appear to what extent the station agents of the railroad companies acted as the agents for the defendant, but it did appear that it was the practice of the station agents, when requested, to procure cars of the defendant and load and bill such cars and give notice thereof to the defendant's general agent at Chicago.

November 17, 1898, at the instance of a firm which wished to ship a carload of eggs from West Salem, Wis., to the plaintiff at New Berlin, N. Y., the station agent of the Chicago, Milwaukee and St. Paul Railway Company at West Salem, Wis., procured one of the defendant's cars. After such car had been loaded he gave the consignors a way bill stating correctly the name of the consignee and the place of the car's destination, and also notified the defendant's general agent at Chicago of the shipment. On November 19, 1898, when the car arrived at Chicago, the defendant's general agent at Chicago sent the consignors a receipt for the car stating correctly the name of the consignee and the place of destination. On the same day a clerk in the employ of the Lake Shore and Michigan Southern Railroad Company, claiming to have received a slip from the Chicago, Milwaukee and St. Paul Railway Company indicating that the car was consigned to New York, made out a way bill in the name of the defendant, directing the delivery of the car at New York, to which place the car was accordingly sent.

It did not appear that the defendant, after its general agent was notified from West Salem of the shipment to New Berlin, gave any directions as to the shipment from Chicago or took any steps to discover whether the destination out of Chicago was to New Berlin or elsewhere.

*Held*, that the defendant was liable for the damages resulting to the plaintiff from the shipment of the eggs to New York instead of to New Berlin;

That if the eggs did not come into the custody of the defendant at West Salem, they did at Chicago and that the defendant was responsible for all mistakes in shipment from Chicago irrespective of the question of who made the mistake.

APPEAL by the defendant, James C. Fargo, as President of the Merchants Dispatch Transportation Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of

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the clerk of the county of Chenango on the 1st day of May, 1899, upon the verdict of a jury, and also from an order entered in said clerk's office on the 1st day of May, 1899, denying the defendant's motion for a new trial made upon the minutes.

*Hiscock, Doheny, Williams & Cowie*, for the appellant.

*George W. Ray* and *O. F. Matterson*, for the respondent.

KELLOGG, J. :

The complaint charges the defendant with negligence in transporting a carload of eggs to New York city instead of to New Berlin, N. Y.

The defendant is a common carrier, operating, however, no railroads, but owning cars constructed as refrigerator cars, by which, through some arrangement with the railroad companies, it transports perishable property from one place to another, and has a general agent in the city of Chicago. Just what authority railroad companies or their station agents have to take the cars of this defendant and load them and bill them does not clearly appear. Hence, it does not clearly appear to what extent the station agent of a line of railway over which the defendant operates its cars is the agent of the defendant. The practice would seem to be for such agents to procure in some way for consignors, when requested, one of the defendant's cars and load and bill the car, giving subsequent notice to the general agent at Chicago. This practice seems at least to have been approved by the defendant.

The firm of McElowney, Francis & Richer at West Salem, Wis., shipped the car of eggs in question to plaintiff at New Berlin, N. Y. They notified the station agent of the Chicago, Milwaukee and St. Paul Railway Company that they wished to make the shipment in a refrigerator car of the Merchants Dispatch Transportation Company. They had been in the habit of shipping in these cars and this had been their method of procuring the cars. The station agent procured a car of defendant or one of defendant's cars, and helped to load the eggs into it, locked the car and gave to the shipper a way bill on November 17, 1893, stating the names of the shippers, name of consignee, N. Richer, place of destination, New Berlin, N. Y., "to be transported by the Chicago, Milwaukee & St. Paul Railway Co. over



the line of this railroad to their warehouse at Chicago," and notice was immediately given to defendant's general agent at Chicago. The car seems to have reached Chicago on November nineteenth. On that day the general agent at Chicago made out and sent to the consignors a receipt as follows :

"MERCHANTS DISPATCH TRANSPORTATION Co.,  
 "DAIRY FREIGHT LINE,  
 "OFFICE WESTERN UNION BUILDING, 138 JACKSON ST.,  
 "11-19-1893.

M.....

"At ..

"We have received this day from ..... Railway

"No. Pkgs.	Contents.	Weight.
	Firkins Butter.	
	Tubs "	
	Bbls. Eggs.	
400	Cases "	21,200
	Boxes Cheese.	
	" D. Poultry.	
	Bbls. "	

Not Negotiable.

"Consigned to N. RICHER.

"Rate Chi. to New Berlin 65 per 100 lbs.

"Advanced charges 69.90.

"Yours respectfully,

6543

"GORDON McLEOD,

"M. D. T., Gen'l. Western Agent."

This is conceded to be the egg shipment made at West Salem, Wis., on November seventeenth.

On the same day, November nineteenth, one John Hedburn, a clerk in the employ of the Lake Shore and Michigan Southern Railroad Company, claiming to have received a slip from the Chicago, Milwaukee and St. Paul Railway Company indicating that these eggs were consigned to N. Richer, New York, made out a way bill for train conductors in the name of the Merchants Dispatch Transportation Company, directing delivery of the eggs to N. Richer, New York, and they were forwarded to New York city and not to New Berlin, which is some 225 miles distant. The plaintiff had no notice of this change of destination. He had in his possession the way bill deliv-

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ered at West Salem to the consignors, also the receipt of the general agent of the defendant. He found the eggs in New York city about November twenty-ninth. They should have been in New Berlin on November twenty-second. They had been taken from the car and stored in some building. It was claimed that the eggs were spoiled or injured by this treatment. It does not appear that the defendant, after its general agent was notified from West Salem of the shipment to New Berlin, gave any directions as to their shipment from Chicago, or took any steps to discover whether their destination out of Chicago was to New Berlin or elsewhere. He gave his receipt to the consignors showing the right destination. If this general agent of the company trusted to a clerk of any railroad company to waybill the eggs, the defendant is not, I think, relieved from liability any more than it would have been had the general agent himself changed the destination. If the eggs did not in fact come into the custody of the defendant at West Salem, Wis., they certainly did at Chicago, and from that moment the company was responsible for all mistakes in shipment from Chicago, by whomsoever the mistake was made. It was bound to see to it that they were properly waybilled to New Berlin. If the Chicago, Milwaukee and St. Paul Railway Company gave to its connecting road a wrong destination, the defendant should have made the correction, for it was then in charge of this car and was fairly informed as to the proper destination. The rule that a railway company acts as the agent of the consignor in making delivery to a connecting railway has in this case no room for application, for it became the duty of defendant, under the facts here, to itself supervise and instruct as to such shipment from Chicago.

This seems to have been the question most seriously urged by defendant on the trial: Whether it was liable for the mistake of any railroad company in making a change at Chicago in the place of delivery. The defendant claimed that it was a question of fact and ought to be submitted to the jury. At the defendant's request the court did so submit it. Whether as a question of law or fact we think, from the testimony, the defendant was properly held to be liable.

The learned court on the motion for a nonsuit said: "It strikes me about the only question for the jury is the question of damages,"

and before the case was submitted to the jury repeated this remark. This was obviously said as to defendant's liability because of a change in the destination, and I am inclined to think that the court was right in that view of the case.

The submission of this question to the jury was a concession, in my opinion, to which defendant was not entitled on the evidence.

The judgment should be affirmed, with costs.

Judgment and order unanimously affirmed, with costs.

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JOHN LEWIS PUTNAM and MARIE G. PUTNAM, his Wife, Appellants,  
v. JOHN R. PUTNAM and Others, Respondents.

*Land set off in a partition suit "as appurtenant" to each of two other lots — rights of the owners of such two lots therein — the right passes under a mortgage of a lot "together with the appurtenances."*

In 1875, when an action was brought to partition lands in the village of Saratoga Springs which were owned by the heirs of Lewis Putnam as tenants in common, a certain strip of land formed the outlet to the street of what was known as the Putnam homestead lot and also formed a means of access to the rear of what was known as the William Putnam house. The commissioners appointed in the action set off the homestead lot, which was known as lot No. 10, to Jennie L. Putnam and the William Putnam house, which was known as lot No. 8, to John L. Putnam, and in their report disposed of the strip before mentioned as follows: "We have also set off in common to defendants John L. Putnam and Jennie L. Putnam as appurtenant to the lot known as the William Putnam House and marked No. 8 on the annexed maps, and the premises last above described as the 'Homestead' and Marked No. 10 on the annexed maps."

*Held*, that the commissioners did not intend to set off the strip in question to John L. Putnam and Jennie L. Putnam as tenants in common, but that it was their intention to give each of such persons and their grantees a common right of usage in the strip as an entirety, and that neither of them had power to force a division of the strip or to exclude the other owner from any portion thereof; That a mortgage executed by John L. Putnam upon lot No. 8 "together with the appurtenances" included the mortgagor's rights in the strip of land in question.

APPEAL by the plaintiffs, John Lewis Putnam and another, from a judgment of the Supreme Court in favor of the defendants, entered in the office of the clerk of the county of Saratoga on the 30th day of January, 1902, upon the decision of the court, rendered

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after a trial at the Saratoga Special Term, dismissing the complaint upon the merits.

*Winsor B. French*, for the appellants.

*Charles S. Lester*, for the respondents Goldsmith and Lester.

*Otto C. Wierum, Jr.*, for the respondents Robert M. S. and Cornelia B. Putnam.

KELLOGG, J. :

This appeal involves the interpretation of a grant by way of mortgage and what was intended to be passed to the mortgagee under the words of the grant, "together with the appurtenances."

The action is brought to partition an irregular strip of land in the village of Saratoga Springs. As appears by the map the strip fronts on a street fourteen feet and extends back about eighty feet, then extends at right angles westerly about forty feet with a width of about twenty-five feet. Its northerly end is bounded by what was known as the Putnam homestead, and formed the outlet of that homestead lot to the street; on the west and south by what was known as the William Putnam house, and was used as a means of access to the rear of that house. This was so in 1875 when the whole premises were owned in common by the heirs of Lewis Putnam. In 1875, in an action in partition between the heirs, the lands were divided by commissioners and their report confirmed June 22, 1875. By the commissioners the homestead lot, on the map marked No. 10, was set off to Jennie Putnam, and the William Putnam house, marked on the map as lot No. 8, was set off to plaintiff John L. Putnam, and the strip sought to be partitioned in this action was disposed of by the commissioners as follows: "We have also set off in common to defendants John L. Putnam and Jennie L. Putnam as appurtenant to the lot known as the William Putnam House and marked No. 8 on the annexed maps, and the premises last above described as the 'Homestead' and Marked No. 10 on the annexed maps," and here follows the description of the before-mentioned strip. This disposition of this strip was confirmed by the court.

Considering the location of lots 8 and 10 and their uses at the time of partition, and considering also the then uses of this strip

solely to serve the needs of the two lots, and the probable depreciation in their value without the strip, it is not difficult to attach the meaning of the commissioners and the court to the words used, "as appurtenant to the lot," etc. Without doubt it was meant that the owners of the lots should forever have a common right of usage in the strip as an entirety, that there could, therefore, be no forced division at the instance of any owner, and no power of exclusion of either owner from the use of any portion of the strip. If the commissioners or court simply meant to set off this strip to John L. Putnam and Jennie Putnam, as tenants in common, there would have been no use in setting it off "as appurtenant to the lot," etc.

This judgment of the court must be accepted and construed as would be like terms appearing in a deed of conveyance. Had the owner of the two lots and the strip conveyed the property lots 8 and 10 in severalty and the strip to both, declaring it to be an appurtenance to each lot, there could be little doubt of his meaning and none as to his power. The parties would take just what he conveyed and take the strip as "appurtenant," giving full force to the grantor's intention. In such a case can it be claimed that either party, without the consent of the other, could compel a sale or division of the strip made by the grantor and accepted by the grantees as appurtenant to the two lots? I think not.

Many authorities are cited declaring that land cannot be appurtenant to land, and hence title to land will not pass under the word "appurtenances" as commonly used in deeds. This means that title to land will not pass by implication. In every case the authorities seek to define the word, and that is all. The court, in *Woodhull v. Rosenthal* (61 N. Y. 390), says: "A thing 'appurtenant' is defined to be a thing used with and related to or dependent upon another thing *more worthy* and agreeing in its nature and quality with the thing whereunto it is appendant or 'appurtenant.'" This definition, however, of the word in the abstract does not prevent a different meaning which any grantor may himself give to the word as he uses it. When a grantor makes a strip of land, by express words, "appurtenant" to two other pieces, his meaning is to be discovered from the context and not from the books.

This strip of land having been set apart to conserve the needs of lot 8 and lot 10, I see no way in which either John L. Putnam or

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Jennie Putnam, or any subsequent grantee, can force a sale or division in an action of partition. This clearly would defeat the intention manifest in the original allotment as made by the commissioners and court. In that allotment, according to its terms, the plaintiff has acquiesced for over twenty-five years. He accepted what was given him, with all its limitations and conditions, express and implied, and one of the implied conditions was that he would not interfere with the use of the strip in its entirety by Jennie Putnam or her grantees. This strip was also made an appurtenance to lot 8 by judgment of the court, and plaintiff, as owner of lot 8, held it and used it as such. When he mortgaged lot 8, "together with the appurtenances," I think he must be deemed to have included this appurtenance. It is not strictly true in all cases that land cannot be made appurtenant to land. Land passes as "appurtenant" in the construction of wills (*Otis v. Smith*, 9 Pick. 292; *Blackborn v. Edgley*, 1 P. Wms. 600; *Doe v. Collins*, 2 T. R. 498; *Buck v. Nurton*, 1 B. & P. 53; *Bodenham v. Pritchard*, 1 B. & C. 350), wholly depending upon the intention of the testator. In the construction of statutes land may be deemed appurtenant to land. (*McDermott v. Palmer*, 8 N. Y. 383.) The demise of a house carries with it the garden, curtilage and close. (*Smith v. Martin*, 2 Saund. 400.) In *Archibald v. N. Y. C. & H. R. R. Co.* (157 N. Y. 574) the court held that the owner of the upland on tidewater took the land under water, granted to his grantor as an "appurtenance;" that such land once granted by the State to the owner of the upland became an appurtenance to the uplands. This would seem to dispose of the declaration that land cannot be appurtenant to land. It does not seem questionable that a grantor may, if he choose, make it appurtenant.

Through the mortgage the plaintiff John L. Putnam having lost his title to lot 8, "together with the appurtenances," we must conclude that he has now no title to this strip sought to be partitioned in this action, and that in any event the plaintiff cannot maintain the action of partition as against the grantees of Jennie Putnam for the reasons hereinbefore stated.

The judgment is affirmed, with costs.

Judgment unanimously affirmed, with costs.

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THE FARMERS' NATIONAL BANK OF MALONE, Respondent, v. ST.  
REGIS PAPER COMPANY, Appellant.

*Demurrer — when allegations of false representations on a sale, set up as a complete defense to an action for the purchase price, are demurrable — counterclaim — rescission.*

In an action brought by the Farmers' National Bank of Malone against the St. Regis Paper Company to recover upon a negotiable promissory note made by the defendant and delivered to the Forest Land and Mill Company and transferred to the plaintiff before maturity, the defendant interposed an answer alleging, as a complete defense, that the note in suit was given in part payment for 22,500 acres of land purchased by the defendant from the Forest Land and Mill Company, and that at the time of the sale the Forest Land and Mill Company had made false representations concerning the quantity of pulp wood upon the land; that if the representations had been true the land would have been worth eight dollars an acre, but the representations being false it was worth only two dollars per acre.

*Held*, that the matter set forth in the answer did not constitute a complete defense, as the defendant could not retain the land and still refuse to pay any part of the purchase price, and that the answer was consequently demurrable; That such matter should have been set up, if at all, by way of counterclaim or under a demand that the sale be rescinded.

APPEAL by the defendant, the St. Regis Paper Company, from an interlocutory judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Franklin on the 14th day of July, 1902, upon an order made at the Saratoga Special Term sustaining the plaintiff's demurrer to the third separate defense contained in the defendant's answer, and directing judgment in favor of the plaintiff.

*Henry Purcell*, for the appellant.

*John P. Badger*, for the respondent.

KELLOGG, J.:

The action is brought to recover upon a negotiable promissory note of \$12,000, made by defendant and delivered to the Forest Land and Mill Company, and, as alleged, transferred before maturity to the plaintiff. The portion of the answer demurred to is claimed by defendant to be a complete defense and bar to the action, and

the facts alleged are so pleaded. The facts are not claimed to be a partial defense; nor are they alleged as a counterclaim to the whole or to a part of the plaintiff's claim. In substance, the defense demurred to alleges that the note in suit was given as a partial payment upon a purchase by defendant from the Forest Land and Mill Company of 22,500 acres of land. The land was deeded to defendant, and the promissory notes and other agreed consideration were turned over to the vendor. The defendant alleges that false representations were made by the vendor as to the quantity of pulp wood upon the land at the time of sale, and alleges that if the quantity as represented had been upon the land it would have been worth eight dollars per acre, but in fact the land, because of the absence of pulp wood, was worth only two dollars per acre. The allegations are sufficient, if true, to entitle the defendant to a rescission of the contract for fraud in case defendant restored to the vendor the lands deeded to defendant. But defendant does not seek to rescind the contract. The allegations are also sufficient to make out a cause of action for damages against the vendor, and such damages might be counterclaimed in an action to recover the purchase price, but defendant does not seek to counterclaim such damages in this action against plaintiff's claim, but he pleads these facts as a bar to the action, a complete defense, and asks for a dismissal of the complaint. That it is not a defense, it seems to me, is too apparent to admit of argument. The matter alleged does not show a failure of consideration so as to defeat the claim on that ground. Nor can it be interpreted as a denial of any material allegation of the complaint, for the facts alleged are not inconsistent with the complaint or with any part of it. That the defendant cannot retain the lands and be supported in its refusal to pay any part of the purchase price is also too clear to need argument or citation of authorities, unless the defendant, by way of counterclaim in an action for the purchase price, shows its damages to be in excess of the purchase price, but that can be shown only by way of counterclaim as the Code provides.

The judgment must, therefore, be affirmed, with costs.

PARKER, P. J., SMITH, CHASE and CHESTER, JJ., concurred.

Interlocutory judgment affirmed, with costs.



In the Matter of the Application of CONSTANT WEBSTER and Others, as Commissioners of Highways of the Town of Chatham, Columbia County, New York, Respondents, for an Order Requiring PHILIP PURCELL, as Commissioner of Highways of the Town of Kinderhook, Columbia County, New York, Appellant, to Unite and Join with the Commissioners of Highways of Said Town of Chatham in the Repairing or Rebuilding of a Bridge over a Stream Dividing Said Towns of Chatham and Kinderhook.

*Bridge in Columbia county — the town of Ghent, not the town of Kinderhook, must repair it.*

While chapter 91 of the Laws of 1818, by which act and the proceedings taken thereunder the town of Kinderhook in the county of Columbia was relieved from the duty of maintaining a certain bridge and such duty was imposed upon the town of Ghent in that county, was repealed by subdivisions 128 and 549 of section 1 of chapter 21 of the Laws of 1838 (second meeting), the rights and liabilities of the two towns in respect to such bridge were preserved by the saving clause contained in section 5 of the act of 1838 which provides: "The repeal of any statutory provision by this act shall not affect any act done or right accrued or established, or any proceeding, suit or prosecution had or commenced in any civil case previous to the time when such repeal shall take effect, but every such act, right and proceeding shall remain as valid and effectual as if the provision so repealed had remained in force."

PARKER, P. J., dissented.

APPEAL by Philip Purcell, as commissioner of highways of the town of Kinderhook, Columbia county, N. Y., from an order of the Supreme Court, made at the Columbia Special Term and entered in the office of the clerk of the county of Columbia on the 10th day of May, 1902, compelling him to unite with the commissioners of highways of the town of Chatham in the repairing or rebuilding of a bridge over a stream dividing the two towns.

*Frank S. Becker*, for the appellant.

*Gardenier & Smith*, for the respondents.

KELLOGG, J.:

It appears from the affidavits of the appellant used on the application referred to that by an act of the Legislature passed in 1818 (Chap. 91) the town of Ghent was created from portions of

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the territory forming the then existing towns of Chatham, Claverack and Kinderhook, and, through said act and proceedings taken under said act, the town of Ghent was charged with the maintenance of that portion of said bridge now sought to be charged to the town of Kinderhook, and, the town of Kinderhook was thereby forever relieved from maintaining the same; that ever since the said charge was made upon the town of Ghent, up to the present time, that town has accepted and discharged that burden and is still solely liable to erect and maintain the west half of the bridge referred to, and that Kinderhook has never at any time assumed such burden and is under no legal obligation to do so. These are facts which are established by the opposing affidavits, and none of these alleged facts are denied by the applicant. No proof was taken by the court and no referee was appointed to establish the truth of the facts alleged, and it does not appear that the learned court considered the facts alleged in opposition to the motion, or regarded them as important in the granting of the order appealed from. If these allegations had been denied and the court had deemed that the granting or withholding of the order in any manner depended upon the facts alleged, without doubt in a matter of such importance to the town of Kinderhook the court would have provided a way for the trial of the issues raised. But the learned court proceeded to a decision based solely on the ground that chapter 91 of the Laws of 1818 was repealed by subdivisions 128 and 549 of section 1 of chapter 21 of the Laws of 1828 (2d session),\* and held that the saving clause contained in section 5 of the last-mentioned act related only to private or individual rights at the time existing. In this we think the learned court was in error. The saving clause referred to reads as follows: "The repeal of any statutory provision by this act shall not affect any act done or right accrued or established, or any proceeding, suit or prosecution had or commenced in any civil case previous to the time when such repeal shall take effect, but every such act, right and proceeding shall remain as valid and effectual as if the provision so repealed had remained in force." It would be difficult to create a saving clause in broader terms. If by the act of 1818 and the proceedings taken under it the town of Kinderhook acquired a

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\* Bound with Laws of 1829.—[REP.]

right or was relieved of a specific burden and the town of Ghent was charged with that burden, certainly this is one of the obligations which the saving clause protected. It cannot be reasoned that the adoption of the act of 1828 had in it any intention of changing the established relations of these towns respecting this particular bridge. The rights of these towns must be determined by the act of 1818 and the proceedings taken under that act.

The order must, therefore, be reversed. If any future application, by suit or otherwise, shall be made, the town of Ghent should, on the facts before us in this record, be made a party.

All concurred, except PARKER, P. J., dissenting.

Order reversed, with ten dollars costs and disbursements, and the application denied without prejudice to any future proceeding or action.

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ROBERT McCARTHY, Respondent, v. GEORGE S. EMERSON, Appellant.

*Negligence — injury to a hod carrier while carrying a hod up a plank from striking the hod against the floor timbers of the story above him — obvious risk, assumed.*

In an action brought to recover damages for personal injuries it appeared that the defendant was a mason and builder who was constructing a brick building; that the walls of the building had been erected to a point above the second story; that the first floor had been laid and that the floor timbers for the second floor had been placed in position; that the distance between the first floor and the bottom of the floor timbers of the second floor was eleven feet nine and one-half inches; that the defendant was also engaged in erecting a brick elevator shaft within the building and that the walls of the shaft had been completed to a point about eight or ten feet above the first floor; that a scaffold had been erected about the elevator shaft which consisted of three platforms, the inner one for the use of the masons laying the wall, the outer one for the use of the mason's helpers, and the center one, which was higher than the other two, being used to hold the materials supplied by the hod carriers; that the outer platform was six feet seven inches above the floor of the first story and that access was had thereto by means of planks placed with one end resting upon the floor of the first story and the other end resting upon the platform; that the distance between the top of the outer platform and the bottom of the floor timbers of the second floor was five feet two and one-half inches; that on the day of the accident the plaintiff, who was an experienced hod carrier in the defendant's employ, attempted to carry a hod of brick up one

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of the planks which was so placed that it ran at right angles with the overhead timbers; that while so doing, his hod struck against one of the timbers, causing him to fall from the plank and to sustain injuries.

The plaintiff was five feet eight or nine inches tall and the hod on his shoulder extended six inches above his head. He testified that he did not look up at the overhead timbers while walking up the plank, although he knew that every step he took brought him nearer to such overhead timbers. It further appeared that the plaintiff might have used one of the other planks if he so desired.

*Held*, that the danger of striking the overhead timbers was an obvious one, the risk of which the plaintiff assumed, and also that the plaintiff had been guilty of contributory negligence.

APPEAL by the defendant, George S. Emerson, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Rensselaer on the 5th day of February, 1902, upon the verdict of a jury for \$1,000, and also from an order entered in said clerk's office on the 13th day of February, 1902, denying the defendant's motion for a new trial made upon the minutes.

*Peter A. Delaney*, for the appellant.

*R. A. Parmenter* and *George B. Wellington*, for the respondent.

CHASE, J. :

The plaintiff has been employed as a hodcarrier for twelve or fifteen years. The defendant is a mason and builder. Plaintiff had worked for the defendant as a hodcarrier for several months prior to the accident. In September, 1899, the defendant was engaged in the erection of a brick building in Troy. The walls of the building had been erected to a height above the second story. The first floor had been laid, and the floor timbers had been placed across the building for the second floor, and the floor thereon was being laid. The distance between the first floor and the bottom of the floor timbers of the second floor was eleven feet nine and one-half inches. Defendant was also erecting a brick elevator shaft within said building, and the walls thereof were completed to the height of eight or ten feet above the first floor. A scaffold such as is in common use had been erected about the said elevator shaft. It consisted of three platforms; the inner one for the use of the masons in laying the wall, the outer one for the use of the masons' helpers, and the center one which was higher than the other two, was used to hold the

brick and other materials that it was the duty of the hodcarriers to carry for the use of the masons. The outer platform was six feet seven inches above the floor of the first story. Three planks, twelve or fourteen inches in width and eighteen or twenty feet long, were placed so that one end of each rested upon the floor and the other end upon said platform. One of these planks was so placed as to run at right angles with the floor timbers of the second floor. The distance between the top of the outer platform and the bottom of the floor timbers of the second floor was five feet two and one-half inches. The space through which the hodcarriers had to pass to take materials to the masons, therefore, was five feet two and one-half inches, less the thickness of the plank on which they traveled. The plaintiff was five feet eight or nine inches in height, and a loaded hod on his shoulder extended six inches above his head. On the morning of the eighteenth of September, plaintiff was mixing mortar in the cellar when he was called by defendant's foreman and directed to assist in carrying brick to the masons engaged in laying the walls of the elevator shaft. Plaintiff took a hod and filled the same with brick, and started up the plank that was so placed at right angles to the floor timbers, and while going up said plank, his hod struck against one of the timbers and he fell from the plank and received the injuries for which this action is brought. Plaintiff testified in regard thereto : " I did not see the overhead timbers when I started to walk up the plank ; I did not look up to see them before I started to walk up the plank ; I put the hod on my shoulder and started up the plank up to the masons to give them some stuff ; I did not look up ; I did not look at the overhead timbers or floor above this runway before I picked up my hod or put my hod on my shoulder. I saw the masons working on the elevator shaft when I was on the floor but I never noticed anything above or any place else. \* \* \*

Q. You knew, of course, that when you walked along this inclined plank every step was bringing you nearer to those overhead timbers, didn't you ? A. Yes, sir, any one would imagine that. Q. No doubt about that at all ? A. No, sir, no doubt about that ; any man would imagine that."

Plaintiff had good eye-sight and it was admitted on the trial that " Everything was open and visible, including the elevator shaft and runway."

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Hodcarriers not only use such runways as they like, but frequently change them about to suit their own convenience. Plaintiff could have used one of the other runways if he had desired to do so. There was but one scaffold to which the brick was being carried. Other workmen used the runway from which the plaintiff fell, and saw and avoided the timbers.

In the erection of walls within a building it is apparent that the necessary scaffolding, as it is raised from time to time to accommodate the bricklayers, must so approach the timbers and flooring that an unobstructed space cannot at all times be left for the helpers. The situation must become more and more contracted until the walls are of such a height that they can be reached from the floor above. The very nature of the work necessarily brings the workman into many places that are contracted and peculiar to the particular piece of work.

It is not necessary for us to consider whether the plank was a "mechanical contrivance" within the meaning of the Labor Law (Laws of 1897, chap. 415 § 18) for the reason that the danger of which the plaintiff complains was an obvious one.

The Labor Law does not permit an employee to shut his eyes against an obvious risk. The Court of Appeals in *Knisley v. Pratt* (148 N. Y. 372) say: "We are of opinion that there is no reason in principle or authority why an employee should not be allowed to assume the obvious risks of the business as well under the Factory Act \* as otherwise."

An employee is required to exercise his faculties and use his senses in connection with his work, and cannot heedlessly perform his work and then, if he is injured when ordinary prudence would have prevented the injury, claim damages from his employer who had no better opportunity to see the danger than had the employee himself. (See 20 Am. & Eng. Ency. of Law [2d ed.] 114; *Fredenburg v. N. C. R. Co.*, 114 N. Y. 582.)

This is a case where the danger was open, obvious and plain to any one at a glance. It would have been known to the plaintiff had he used the slightest prudence. The plaintiff, instead of familiarizing himself by observation with the structures and their situation

\* Laws of 1886, chap. 409, § 12, as amd. by Laws of 1890, chap. 898.—[REP.]

and condition (*Fredenburg v. N. C. R. Co.*, *supra*), admits that he went up the plank without the slightest care and without even looking up. Considered as an obvious risk, or with reference to plaintiff's contributory negligence, a recovery should not be sustained.

A person who utterly fails to use that prudence which the situation and circumstances require, is guilty of contributory negligence as a matter of law. (*Piper v. N. Y. C. & H. R. R. Co.*, 156 N. Y. 224; *Albring v. N. Y. C. & H. R. R. Co.*, 46 App. Div. 460.)

The judgment and order should be reversed and a new trial granted, with costs to the appellant to abide the event.

PARKER, P. J., SMITH and KELLOGG, J. J., concurred; CHESTER, J., not sitting.

Judgment and order reversed and a new trial granted, with costs to appellant to abide event.

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WILLIAM KLOS, Appellant, v. THE HUDSON RIVER ORE AND IRON COMPANY, Respondent.

*Negligence — injury from the explosion of dynamite put in a hole drilled in a clinker in a kiln — when the complaint is properly dismissed — neglect of duty by a competent fellow-servant — the master is not bound to assume that it will occur.*

In an action to recover damages for personal injuries, it appeared that the defendant, an iron mining corporation, maintained several kilns for the purpose of roasting the iron ore; that in the roasting process clinkers would form within the kiln, which were sometimes so large that they could not be taken out through the opening therein; that for the purpose of breaking up these clinkers, the defendant employed four men, known as the "clinker gang," to drill holes in the clinkers, and explode dynamite therein.

The work of cutting and preparing the dynamite was done by the foreman of the gang, but the work of inserting the dynamite into the drilled hole and exploding the same was usually done by another member of the gang, one S. Dynamite will explode by heat without coming in contact with a blaze. The necessity of having the clinkers cool before applying the dynamite was known to the workmen in charge, and it was a common practice for them to pour water upon the clinkers to cool them.

In 1899 the defendant employed the plaintiff as one of the "clinker gang," the particular part of the work performed by him being the striking of the drill used in making the holes for the insertion of the dynamite. On the third day

that the plaintiff was employed he assisted in drilling a hole in a large clinker. The hole was filled with dynamite by S., who then left the kiln for the purpose of getting material to be used in lighting the fuse. During his absence, and while the plaintiff was removing the drill and other tools from the kiln, the dynamite prematurely exploded and seriously injured the plaintiff.

The plaintiff had received no instructions from the defendant as to the use of dynamite or as to the dangers attending its use, but he knew, in a general way, that it was explosive and dangerous.

*Held*, that the judgment entered upon the dismissal of the complaint by direction of the court should be affirmed;

That all the acts connected with the work of blasting the clinkers related to the duty of the employees, and that, if there was any negligence in the performance of such work, it was the negligence of the plaintiff's fellow-servants, for which the defendant was not liable;

That the defendant had a right to assume that the plaintiff's fellow-servants, whose competency was not questioned, would not be negligent in their work, and that it was not necessary for it to inform the plaintiff of possible or probable dangers that would arise in case of negligence on the part of his fellow-employees.

APPEAL by the plaintiff, William Klos, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of Columbia on the 15th day of May, 1901, upon the dismissal of the complaint by direction of the court after a trial at the Columbia Trial Term.

The defendant, a domestic corporation, is engaged in mining iron ore in the county of Columbia. In connection with its mines and for the purpose of roasting the ore and preparing it for market it has ten cylindrical kilns about twenty-two feet in diameter and sixty feet high. The broken rock taken from the mines, together with coal, is placed in these kilns from the top, and the fire therein roasts the ore, and the ore so roasted is drawn off through chutes at the base of the several kilns into cars. In the process of roasting the ore clinkers form within the kiln which settle to the base of the kiln and are sometimes so large that they cannot be drawn off through the opening into the chute. For the purpose of breaking up these clinkers men are employed by the defendant to drill holes into such clinkers and to apply and explode dynamite therein. There are four men so employed known as the "clinker gang," one of whom is in charge of the work. The dynamite, caps and fuse were kept in a small building or "shanty" in the exclusive charge of the foreman of the gang, and he cut and prepared the



same for the several explosions. Sometimes he actually inserted the dynamite into the drilled hole and exploded the same, but that work was principally done by one S., who was one of the four men and the one who had been doing that work for months, and for as long a time as the witnesses sworn had knowledge of the work. In 1899 the plaintiff was engaged as one of the "clinker gang." The particular part of the work performed by him was striking the drill used in making the holes for the insertion of the dynamite. The said S. held the drill while plaintiff and another man struck the drill alternately with heavy hammers. The third day that plaintiff was so employed a very large clinker was found in front of the opening at one of these kilns and he, with his fellow-laborers, went to the kiln for the purpose of drilling a hole therein and breaking the clinker with dynamite as stated. The hole was drilled nine or ten inches deep. The foreman cut off the required piece of dynamite and prepared the same with cap and fuse attached for the purpose of insertion in the hole. Shortly thereafter S., who had been holding the drill, inserted the piece of dynamite in the hole so drilled, and then fastened the same with some prepared clay. S. then went to get some waste and kerosene to be used in lighting the fuse, while the plaintiff was removing the drill and other tools, and while he was so engaged removing the tools the dynamite prematurely exploded causing the injury for which this action is brought. The plaintiff was instructed as to the use of the hammer, but was not instructed as to the use of dynamite, or as to the dangers attending its use. His duties did not require him to handle the dynamite. Further facts appear in the opinion.

*Andrew J. Skinner*, for the appellant.

*Frank E. Smith*, for the respondent.

CHASE, J.:

Although plaintiff had only been in the defendant's employ for three days, and he says that he never saw dynamite before, yet he was to some extent familiar with the dangers incident to its use. He says: "I heard them talk about it a good deal. I heard it was very dangerous; the first day I went there and worked there I heard if you put a cartridge in it would go off; I did not hear it

would go off without any apparent cause; I heard it would never explode except you put a cartridge in." Plaintiff not only knew that dynamite was explosive and dangerous, but he knew that this particular piece of dynamite had been prepared for explosion and that the same would explode as soon as fire was applied by way of the fuse. He had seen dynamite so exploded a great many times. The clinkers were formed in that part of the kiln which was heated to the extent of three thousand to four thousand degrees. It was from the place so heated that the clinkers dropped down at the opening of the kiln. When the clinkers first dropped they were heated to a very high degree. After they remained at the base of the kiln a sufficient length of time they became cool. Dynamite will explode by heat without coming in contact with a blaze. It would seem that ordinary intelligence in connection with the general and special knowledge that the plaintiff possessed would be sufficient to suggest that the use of dynamite in close proximity to great heat and in material more or less heated was necessarily attended with danger. The only negligence claimed in the use of the dynamite itself is in placing the same in the clinker before it had sufficiently cooled. The necessity of having the clinkers cool was known to the workmen in charge, for it appears that it was common practice to put water on the hot clinkers from a hose to cool them. Any negligence in connection with the use of the dynamite was the negligence of those employed with the plaintiff in the performance of the same general business of the defendant. The presumption is that defendant exercised proper care in the selection of these servants. It was incumbent on the plaintiff, if he claims that his fellow-servants were incompetent, to have shown it by proper evidence. Plaintiff's evidence shows that this work was being done in substantially the same way by the same men other than the plaintiff for several months, and although a great many clinkers were broken with dynamite every day not a single specific act of negligence by any of them was shown, and the only testimony called to our attention that it is claimed indicates the incompetency of S. is that of one witness who says: "During that time, from the time I came there, up to this Wednesday when the plaintiff was injured he was shooting most of the time; worked around the same as the rest of us; he was a laboring hand." This

witness was one of the clinker gang and at the time of the accident had worked there with S. in such gang for more than four months. All the knowledge that witness seems to have had on which to characterize S. as a "laboring hand" is the fact that so long as he had known him "he was shooting most of the time." This is not sufficient to show that S. was incompetent to perform the duties with which he was intrusted. A master has a right to assume that a competent servant will perform his duty. The possible negligence of a fellow-servant was assumed by plaintiff when he accepted his employment.

Where one servant is injured by the negligence of a servant employed by the same master, the liability of the master is determined solely by the question whether the offending servant was negligent respecting a duty pertaining to an operative or respecting a duty owing from the master to the injured servant. If it pertained to the master's duty then the master was liable if he or the servant to whom he delegated the duty failed to use the requisite care. (Thomas Neg. 866; *Crispin v. Babbitt*, 81 N. Y. 522.)

The liability of the master depends upon the character of the act in the performance of which the injury arises, without regard to the rank of the employee performing it. (*Crispin v. Babbitt*, *supra*.)

All the acts connected with the work of blasting the clinkers related to the duty of the employees. If there was any negligence in the performance of the work intrusted to them it was the negligence of plaintiff's fellow-servants, for which defendant is not liable. (*Vitto v. Keogan*, 15 App. Div. 329; *Green v. Smith*, 169 Mass. 485.)

The defendant had a right to assume that competent employees would not be negligent in their work, and it was not necessary for it to inform the plaintiff of possible or probable dangers that would arise in case of negligence on the part of his fellow-employees. (*O'Brien v. Buffalo Furnace Co.*, 68 App. Div. 457.)

The judgment should be affirmed, with costs.

Judgment unanimously affirmed, with costs.

JANET FRANCHOT PAIGE, Appellant, v. SCHENECTADY RAILWAY  
COMPANY, Respondent.

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*Patent granted by the Deputy Governor of the colony of New York to an individual of land bounded on a street — when the title passes to the center line of the street.*

The patent granted November 9, 1670, by Francis Lovelace, Deputy-Governor of the colony of New York, to Pieter Jacobs Borsboom of a lot in the city of Schenectady, which described the premises as follows, "a Certain Lott of Ground at Schanecktade belonging to Pieter Jacobs Borsboom & now in his Tenure or occupation, lyeing in a Square of Two hundred foot wood measure at Eleaven Inches ye foot, abutting on ye East Syde on Benjanyn Roberts, on ye South syde on William Tellers, and on ye West & north sydes on ye highway," conveyed to the patentee the title to the center of the highway referred to in the patent.

KELLOGG, J., dissented.

APPEAL by the plaintiff, Janet Franchot Paige, from an order of the Supreme Court, made at the Albany Special Term and entered in the office of the clerk of the county of Schenectady on the 17th day of July, 1902, vacating a temporary injunction restraining the defendant from operating its electric street railway on Washington avenue in the city of Schenectady in front of the premises owned by the plaintiff.

The plaintiff's premises are situated at the southeast corner of Washington avenue and Front Street in the city of Schenectady. Her title to the premises is derived under a patent dated November 9, 1670, granted by Francis Lovelace, Deputy Governor of the Colony of New York, which described the land as follows: "a Certain Lott of Ground at Schauecktade belonging to Pieter Jacobs Borsboom & now in his Tenure or occupation, lyeing in a Square of Two hundred foot wood measure at Eleaven Inches ye foot, abutting on ye East Syde on Benjanyn Roberts, on ye South syde on William Tellers, and on ye West & north sydes on ye highway."

*Edward Winslow Paige*, for the appellant.

*Marcus T. Hun*, Learned Hand and *James A. Van Voast*, for the respondent.

## PER CURIAM:

We have reached the conclusion in this case that the plaintiff must be deemed the owner of the fee to the center of Washington avenue. The claim by the defendant that the original patent under which the plaintiff claims bounded her premises on the west by such street, and that, therefore, being from the sovereign, it operated to convey only to the east line of such street, is not, in our opinion, a correct exposition of the law applicable to her case. The circumstances under which such patent was issued are quite different from those controlling the case of *Graham v. Stern* (168 N. Y. 517). They are rather controlled by the rule laid down in *Cheney v. Syracuse, Ontario & New York R. R. Co.* (8 App. Div. 620; *affd.*, 158 N. Y. 739), and we do not consider that such case was overruled, or at all weakened, by the *Stern* case.

It is sufficient to state our conclusion upon this question without giving an extended analysis of the argument by which we reach it.

Assuming that the plaintiff is such owner to the middle line of the street, the other questions which the case presents have been already decided by this court. In *Peck v. Schenectady R. Co.* (67 App. Div. 359) we decided that Peck, who was an adjacent owner upon this street, was entitled to an injunction against this defendant, forbidding it from building or operating its line upon her property. And we further decided that the trial court did well in refusing to substitute for such an injunction an order that the amount of Peck's compensation for such taking by this defendant be ascertained and awarded in that action. Such decision sustains the plaintiff's right in this case to the injunction which the court below has vacated, and in this respect our decision was approved by the Court of Appeals. (*Peck v. Schenectady R. Co.*, 170 N. Y. 298.) The same reasons which induced us to concur with the action of the trial court in the *Peck* case induce us to continue the injunction in this case. And more than that, and aside from the question whether the plaintiff can under the Constitution (Art. 1, § 7) be compelled to submit the question of her damages to the decision of the Special Term, the plaintiff's counsel upon this argument distinctly claimed that this defendant had no right to take the plaintiff's lands even by condemnation proceedings, but he declined to then argue such question, because it was not presented by the record in this case. We

see no reason why he should not be allowed to present that question upon a direct proceeding to condemn. Although the defendants have proceeded to construct their line through this street, they knew that if the plaintiff was the owner to the center thereof they were trespassers in so doing. They deliberately expended their money, and took the risk of establishing that the plaintiff had no such ownership. It is not quite accurate to claim that they were compelled to build on each owner's land in order to get the question of ownership before the court. A threat to build, or very slight and inexpensive work, on the land of any one of such adjacent owners would have compelled a suit to enjoin it, and the moment such action was commenced the question of ownership as to all could have been tried and determined. We discover no particular equity in the position which the defendant has assumed in this case, and while we are not disposed to grant a mandatory injunction requiring it to remove from the plaintiff's land what it has already unlawfully placed thereon, we do restrain it from using the same, or from any further entry thereon.

Although the parties agree that this record contains all the evidence either has bearing upon the question of the plaintiff's ownership to the center of the street, yet we cannot, on this appeal, order a final judgment in the action. Our injunction, therefore, must necessarily be a temporary one, operating only until such final judgment shall be rendered.

All concurred, except KELLOGG, J., dissenting.

Order reversed, with ten dollars costs and disbursements, and motion to vacate injunction denied, with ten dollars costs.

ALVIN RICHTMYER, Respondent, v. MARQUIS A. LASHER and Others,  
Defendants, Impleaded with CATHERINE A. STEPHENS and Others,  
Appellants.

*Trust — created by the assignment of mortgages to protect a vendor who has conveyed with warranty a part of the mortgaged premises — a subsequent assignment by the administrator of the mortgagee does not terminate the trust — the assignee cannot foreclose the mortgages to the prejudice of such vendor — rights of the latter's vendees.*

In April, 1883, Marquis A. Lasher purchased a farm and gave a purchase-money mortgage thereon. In July, 1883, he executed to his brother, Allen Lasher, two other mortgages upon the farm for \$2,500 and \$400 respectively. Thereafter he conveyed the premises to Samuel Decker, a son-in-law of Allen Lasher, the consideration being the mortgages thereon.

In 1887 Samuel Decker sold certain parcels of the farm to one Rost and executed warranty deeds thereof. In 1889 the lands so conveyed to Rost were released from the lien of the purchase-money mortgage. In July, 1891, Allen Lasher assigned to his daughter, Mary Decker, the wife of Samuel Decker, the two mortgages held by him by an instrument containing the following clause: "This assignment is made to protect the said party of the second part hereto and her husband Samuel Decker, either or both, from any and all liability incurred by them or either of them on account of any deeds given by them for any portion of the Elwood farm, and also on condition that when any other or more deeds are given for any unsold portion of said farm, then the party of the second part will execute releases from the mortgages hereby assigned on condition the purchase money is applied on either the Elwood mortgage or the mortgages hereby assigned." In November, 1892, Allen Lasher died intestate, and on December 8, 1893, Samuel Decker, as administrator of the estate of Allen Lasher, assigned to his wife, Mary Decker, such interest as Allen Lasher still had in the mortgages by an instrument containing the following clause: "The intention herein being to convey to said Mary Decker any interest the estate of said deceased may have in the said two bonds and mortgages."

Thereafter Mary Decker assigned the two mortgages to Alvin Richtmyer, who brought an action to foreclose such mortgages.

*Held*, that the assignment of the mortgages in suit executed by Allen Lasher operated to create a trust for the benefit of Samuel Decker, to protect him upon the covenants of warranty in the deeds theretofore made by him, and to preserve the purchase moneys thereafter received as a fund for the satisfaction of the liens upon the farm;

That, after the execution of the assignment by Allen Lasher, the latter retained no interest in the mortgages, and that, consequently, the assignment from the administrator of Allen Lasher's estate to Mary Decker did not confer any addi-

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tional rights on Mary Decker, or operate as a waiver by Samuel Decker of his individual rights in the trust created for his benefit;

That, under the assignment from Allen Lasher, Mary Decker had no power to foreclose the mortgages assigned to her as against the lots sold to Rost;

That as such assignment had been recorded and as the consideration for the assignment to Richtmyer was an antecedent indebtedness, Richtmyer took the mortgages in suit impressed with the same trust upon which Mary Decker held them and could not enforce them to the injury of Samuel Decker;

That the persons taking title from Rost under warranty deeds were entitled to enforce the trust created by the assignment from Allen Lasher to Mary Decker, and that Richtmyer could not enforce the mortgages assigned to him as against them.

APPEAL by the defendants, Catherine A. Stephens and others, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Delaware on the 20th day of February, 1902, upon the report of a referee foreclosing a mortgage and directing a sale of the mortgaged premises.

In April, 1883, Marquis A. Lasher purchased a farm in Delaware county and gave a \$5,500 purchase-money mortgage thereon. In July of that year he executed to his brother, Allen Lasher, two other mortgages upon the same premises, one for \$2,500 and the other for \$400. In April, 1887, Marquis A. Lasher told his brother Allen that he was convinced that he could not pay off these mortgages, and was advised that Samuel Decker, who was the son-in-law of Allen Lasher, would take the farm for the amount of the mortgages on it. There were also some judgments then outstanding against Marquis A. Lasher, which were liens on the farm subsequent to the mortgages. Marquis A. Lasher thereupon conveyed the farm to Samuel Decker, the consideration being the mortgages thereon. Samuel Decker thereupon proceeded to sell parcels of land off of such farm, and executed warranty deeds for the same. One of such deeds was executed in August and the other in September of 1887, and both were to Ernest C. Rost and conveyed lots designated on a map in the record as lots A, B, C and D.

In November of the same year Rost, by warranty deeds, conveyed all of such parcels except D to different parties, through whom the defendants in this action claim. On June 22, 1889, the lands so conveyed to Rost were released from the lien of the purchase-money mortgage. In July, 1891, Allen Lasher assigned to his daughter, Mary Decker, the wife of Samuel Decker, the two



mortgages for \$2,500 and for \$400 which he held against the said farm, by a qualified assignment, to which reference will hereafter be made. Up to this time nothing had been paid, or asked for either of principal or interest, upon these two mortgages. Allen Lasher died in November, 1892, intestate, and Samuel Decker was appointed his administrator, and he, as such, on December 8, 1893, assigned such interest as Allen Lasher still had in the said mortgages to his said wife, Mary Decker.

The plaintiff in this action claims to be the owner of such two bonds and mortgages by assignment from Mary Decker, made subsequent to this latter assignment to her by her husband as administrator of the estate of Allen Lasher; and this action is brought to foreclose such mortgages and for a sale of the farm therein described.

Several defendants, parties claiming through the Rost conveyance, defend against a sale of the lots so conveyed to them, on several grounds, which they claim operate to release such lands from the lien of such mortgages.

The referee found against them on all such grounds, and from the judgment entered on his report this appeal is taken.

*William C. Cammann*, for the appellants Parker Mann and Julia Mann.

*George W. Stephens*, for the appellant Catherine A. Stephens.

*H. Aplington*, for the appellants Annie D. Locke and others.

*Eugene E. Howe* and *C. L. Andrus*, for the respondent.

PARKER, P. J.:

From the voluminous facts found in this record I have stated only those above set forth, because they suffice to present the question upon which I think the referee has erred.

The assignment of the two mortgages in question by Allen Lasher to Mary Decker on July 10, 1891, is one absolute in terms, except as to the last provision thereof, which reads as follows: "This assignment is made to protect the said party of the second

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part hereto and her husband Samuel Decker, either or both, from any and all liability incurred by them or either of them on account of any deeds given by them for any portion of the Elwood farm, and also on condition that when any other or more deeds are given for any unsold portion of said farm then the party of the second part will execute releases from the mortgages hereby assigned on condition the purchase money is applied on either the Elwood mortgage or the mortgages hereby assigned."

In this provision I cannot discover that anything whatever is reserved to Allen Lasher. As to him the assignment is complete, and all his rights and interests in the mortgages passed from him to her. The provision, it is true, limits her use and ownership, but retains nothing to him. Its purpose evidently was to place the mortgages in the custody and ownership of one who could not use them to disturb the possession or title of the grantees of Samuel Decker as to such of the mortgaged premises as he had already conveyed with warranty and as to such of the lands as still remained unsold to enable him to give a title freed from the mortgages, provided the purchase money should be applied to discharging the mortgage liens then on the land.

Both parties agree that by such provision a trust was created and that Mary Decker took the mortgages subject to it, and in my opinion such trust was for the benefit of Samuel Decker to protect him upon his warranties already made and to preserve the purchase moneys thereafter received as a fund for the satisfaction of the liens on the farm. I gather from the evidence that Allen Lasher had suggested to Samuel Decker that he take the farm subject to the mortgages, and doubtless he had given him to understand that as to the two which he, Lasher, then owned, he would not enforce them as against Decker. Thus he was willing to give up all his interest therein and put them in the hands of his daughter under the trust above indicated. This was the source and the only source of Mary Decker's title to the mortgages. The fact that she subsequently took an assignment from the administrator of Allen Lasher's estate of such mortgages does not change the situation. As suggested above, after his assignment to her, Allen Lasher had not the slightest interest in the mortgages. Nothing was to be paid to *him* from

the sales of the lands. All was to be applied upon the Elwood mortgage, in which he never had any ownership, or else upon the two mortgages in question, which he had thereby given to his daughter with full power to collect and discharge. If it be suggested that there was a condition annexed to the assignment concerning the application of the purchase money on the mortgages, the breach of which might possibly work a reversion of the mortgage to himself, it is sufficient to say that no such breach is claimed, and even if by the administrator's assignment she was relieved from such condition, it does not change the situation.

What rights, then, did Mary Decker acquire by this assignment from her father on July 10, 1891? I think it very clear that if she had attempted to foreclose such mortgages and force a sale of the lands that Samuel Decker had sold to Rost, it would have been a direct violation of her trust, and he could have enjoined her from so doing. The clear and principal purpose of the trust was to protect Samuel Decker "on account of any deeds given \* \* \* for any portion of the Elwood farm." The only way such assignment could protect him was to prevent the mortgages being used to disturb the grantees in such deeds. Clearly, then, if they were ejected by a foreclosure of the mortgages at the suit of Mary Decker, she would be using the mortgages for the very purpose that the assignment to her was intended to prevent. Assuming then that she, herself, might not foreclose the mortgages as against the lots sold to Rost, I cannot understand how she could invest her assignee with that right. The assignment was on record, so that its force and effect was fully known to this plaintiff. He claims to have taken the mortgages from her upon a prior indebtedness, and clearly no equity is shown which would authorize him to claim any better title or greater rights than she herself had. He took the mortgages impressed with the same trust with which she held them, and hence cannot enforce them to the injury of Samuel Decker. (27 Am. & Eng. Ency. of Law, 321.)

It is found by the referee that, by reason of Samuel Decker's assignment as administrator of Allen Lasher's estate of these same two mortgages to his wife, he waived his rights in this trust. But I can find nothing in that act to indicate any intent to waive any of his individual rights. It is found, as a fact, that such assignment

contained this clause: "The intention herein being to convey to said Mary Decker any interest the estate of said deceased *may* have in the said two bonds and mortgages." This provision very clearly repels any inference that he conveyed to her any personal interest of his own, and it is very evident that he had doubts as to whether his intestate really had any. Very clearly this act did not operate to surrender to her any rights secured to him by the trust in question. It seems to be assumed by the plaintiff that an absolute assignment by Allen Lasher to Mary Decker, subsequent to the one of July 10, 1891, would have discharged her from the trust therein contained. But such is not the law. Having parted with his interest in the mortgages and transferred them to Mrs. Decker impressed with the trust above stated, he had no power to withdraw or alter it, although its creation was an entirely voluntary act on his part. (27 Am. & Eng. Ency. of Law, 310; *Mabie v. Bailey*, 95 N. Y. 206; *Wallace v. Berdell*, 97 id. 13.)

There is no pretense that all parties in interest ever united to discharge these mortgages from the trust imposed upon them by Allen Lasher; and it seems plain that such trust followed them into the hands of this plaintiff. As stated above, the main purpose of the trust was to protect the lands which Samuel Decker had sold to Rost with warranty from being sold under a foreclosure thereof, and this action the plaintiff has brought for the purpose of effecting that very sale. He asks the aid of a court of equity to enable him to do so. The grantees of such lands, who are protected by Decker's warranty against such a sale, are parties to this action, as is also Mary Decker and the estate of Samuel Decker, who is now deceased. Such grantees have an equity in the enforcement of such trust. Had the assignment of the mortgages been to Samuel instead of to his wife, it would have inured to their benefit. (*Mickles v. Townsend*, 18 N. Y. 575.) Upon the same principle the rights of Samuel Decker in the trust created for his benefit inured to their benefit, and they should be allowed to enforce them in this action. All of the defendants who have appealed from the judgment directing a sale of the property take their title from Rost, and are entitled, if ejected by such sale, to recover over against the estate of Samuel Decker. They should have been allowed, therefore, to invoke in this action the effect of the trust under which these mortgages were

held by Mary Decker, and the judgment should have declared that, as to these lands, the mortgages could not be enforced.

For this error the judgment must be reversed.

SMITH, KELLOGG, CHASE and CHESTER, JJ., concurred.

Judgment reversed, referee discharged and new trial granted, with costs to appellant to abide event.

EDWARD G. RIGGS and OTTO KELSEY, as Receivers of the REPUBLIC SAVINGS AND LOAN ASSOCIATION, Respondents, v. MYRON CARTER, Appellant, Impleaded with SARAH M. CARTER and Others.

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*Innocent savings and loan association — borrowing shareholders relieved from their contracts as of the date of the appointment of the receivers — approximate value of a shareholder's stock, to be applied in reduction of a mortgage given by him.*

When a savings and loan association becomes insolvent and passes into the hands of receivers and is no longer able to carry out its contract with the borrowing shareholders, all of such borrowing shareholders should be relieved from their contracts with the association as of the date on which the receivers were appointed and an equitable adjustment should then be made.

In an action brought by the receivers of the association against a borrowing shareholder to foreclose the mortgage executed by him, the court is not, in the absence of any proof upon the subject or any request in regard thereto, required to approximately determine the value of the shareholder's stock to the end that he may be relieved from his mortgage to the extent of his interest in the assets of the association.

APPEAL by the defendant, Myron Carter, from a judgment of the Supreme Court in favor of the plaintiffs, entered in the office of the clerk of the county of Albany on the 22d day of August, 1902, upon the decision of the court, rendered after a trial at the Albany Special Term, foreclosing a mortgage and directing a sale of the mortgaged premises.

The Republic Savings and Loan Association, a domestic corporation, was organized in 1890. The plaintiffs were appointed temporary receivers of said association on the 29th day of June, 1900, and the association was dissolved and the plaintiffs were appointed permanent receivers on the 1st day of March, 1901. The defendant Myron Carter, on the 9th day of June, 1897, became a member

of said association and the owner of twelve shares of stock therein. On the 18th day of September, 1897, said Carter executed to the association a bond and mortgage dated on that day. The mortgage contained a condition as follows: "This grant is intended as a security for the payment of the sum of one thousand (\$1,000) dollars advanced by said association to said parties of the first part upon twelve (12) shares of the stock of said association, \* \* \* upon the terms and conditions of the articles of association thereof, and the interest thereon to be computed from the date thereof at and after the rate of six per cent per annum, and a monthly premium of Four 80/100 dollars for the cash advanced on the maturity value of the said shares, and the sum of six dollars for the monthly dues on said shares, and all fines which may be imposed by said association for default in payment of the said interest, premium and dues."

On the same day said Carter assigned and transferred to said association his twelve shares of stock in said association as collateral security for the payment of the debt mentioned in said bond and mortgage.

At the time of the appointment of said temporary receivers, said Carter was in default in the payment of dues to the extent of seventy-eight dollars, in the payment of premiums to the extent of seventy-one dollars, and in the payment of fines to the extent of thirty-two dollars and ten cents, and no payments have since been made on account of said stock or mortgage.

The plaintiffs commenced this action to foreclose said mortgage and the defendant Carter interposed an answer by which he denies that he is indebted for any dues, premiums and fines unpaid at the time the temporary receivers were appointed, and he also alleges that he is entitled to be credited on account of said mortgage with the amount of all premiums and fines theretofore paid by him, and he also alleges that he is entitled to be credited on account of his mortgage with the present value of the amount theretofore paid by him as dues upon said twelve shares of stock.

The court rendered a judgment for the foreclosure and sale of the premises described in the mortgage and for the payment to the plaintiffs of \$1,000, the principal of the mortgage, together with the amount of premiums and fines unpaid at the time when the temporary receivers were appointed, and also for the amount of insur-

ance premiums paid as provided by the terms of the mortgage and interest.

*W. F. Hickey*, for the appellant.

*G. D. B. Hasbrouck* and *Russel S. Johnson*, for the respondents.

CHASE, J. :

The appellant and respondents are not simply debtor and creditors. The relation between them is different from the usual relation between mortgagor and mortgagees. Appellant first became a member of the association, and as a member he was obligated to pay certain dues and was subject to certain fines. His stock was payable at maturity. Its maturity depended upon the profits of the association, some portion of which was derived from premiums paid by borrowing members. When appellant gave his bond and mortgage the association simply advanced money to him on account of the maturity value of his stock, and he agreed to pay interest thereon and also a premium for the privilege of obtaining the loan. The mortgage was given to secure payment of the interest and premium and also the other payments required of appellant as a member. The advance to him on account of the maturity value of his stock did not change his relation to the association as a member. There is no dispute in regard to the payments of interest or as to the same being properly applied upon the mortgage. When the association went into the hands of receivers and was no longer able to carry out the contract with appellant, he was relieved from compliance with the terms of the contract, and an equitable adjustment between them must be made. (*Hall v. Stowell*, 75 App. Div. 21. See *Breed v. Ruoff*, 54 id. 142; *Hannon v. Cobb*, 49 id. 480.)

The receivers represent all the members of the association, and for the purpose of an equitable adjustment the members should all be relieved from their contracts at the same date, and such date manifestly should be the date on which the receivers were first appointed.

The payments of interest seem to be the only ones made by appellant referable to the loan itself. The appellant along with the other members obtains credit for all other payments by such payments swelling the general assets of the association. Had the asso-

ciation continued in business, appellant would have received his return for such payments when the stock matured. The trial court did not charge the appellant with unpaid dues, and it is not necessary for us to consider any question relating thereto. The mortgage by express terms was given to secure among other things the payment of premiums and fines. At the time the temporary receivers were appointed the unpaid fines and premiums were due and owing under the terms of the mortgage, and payment thereof must be made or in some manner adjusted to put the appellant on the same basis as the other members of the association who have paid their premiums and fines to the time of the receivership.

The appellant is undoubtedly entitled to receive his proportionate share of the net assets of the association when the same shall be divided. It may well be that equity would require that the value of his stock should be at least approximately determined in this action to the end that the appellant should be relieved from his mortgage to the extent of his interest in the assets of the dissolved corporation.

Referring to this subject, it is said in *Breed v. Ruoff* (*supra*): "On the other hand, here may well be a hardship worked by a disregard of the equity that should strike a balance between his debt and his dividend. If the receivers, by marshalling assets and liabilities and by allowing for expenses, cannot determine, they can at least approximate the prospective value of each share of stock, and hence the probable dividend due each shareholder sufficient for the purpose at hand." The trouble in this case is that the appellant did not present to the court any facts whatever relating to the dissolved corporation or the assets remaining in the hands of the plaintiffs applicable for distribution among the members. In the absence of any proof upon the subject or any request in regard thereto, the court was not required to adjust such equity as between the parties hereto.

The judgment of the trial court must, therefore, be affirmed, and the appellant, instead of having such dividend, if any, applied upon his mortgage, must await its payment at some future time.

Judgment unanimously affirmed, with costs, CHESTER, J., not sitting.



GEORGE D. GENUNG, Respondent, v. HUGH J. BALDWIN, Appellant.

*Provocation — considered in reduction of actual as well as of punitive damages.*

In an action to recover damages for an assault and battery, evidence of provocation may be taken into consideration by the jury in reduction of actual or compensatory damages as well as in reduction of punitive damages.

PARKER, P. J., dissented.

REARGUMENT of an appeal by the defendant, Hugh J. Baldwin, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Tioga on the 9th day of September, 1901, upon the verdict of a jury for \$450, and also from an order entered in said clerk's office on the 5th day of September, 1901, denying the defendant's motion for a new trial made upon the minutes.

Upon the original argument of the appeal the court affirmed the judgment. The opinion handed down thereon is reported in 75 Appellate Division, 195.

*Frederick E. Hawkes*, for the appellant.

*Frank A. Bell* and *Martin S. Lynch*, for the respondent.

CHESTER, J.:

This court, after deciding the appeal herein, granted a motion for a reargument.

The principal question urged upon the attention of the court upon the reargument was, as to whether or not the learned justice who presided at the trial erred in refusing to charge the jury that evidence of provocation by the plaintiff might be considered in mitigation of actual and compensatory damages. The defendant had an exception to this refusal.

When the case was originally argued counsel did not call the attention of the court to the case of *Kiff v. Youmans* (86 N. Y. 324), nor was any emphasis given to the distinction between the application of provocation in mitigation of punitive damages and of its application in mitigation of actual damages. The question raised by defendant's exception above mentioned was not considered

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by the court in deciding the appeal, as appears by the opinion then handed down which is reported in 75 Appellate Division, 195.

The case of *Kiff v. Youmans* (*supra*), like this, was one for an assault and battery. The assault in that case was committed while the plaintiff was a trespasser upon the defendant's premises and the defendant used more force than was necessary in ejecting him therefrom. The court charged the jury that, in case they found the defendant's acts were wanton and malicious, they might, in addition to the compensatory damages, return a sum by way of punitive or exemplary damages. The plaintiff had a verdict. The judgment on the verdict was affirmed by the General Term, but was reversed by the Court of Appeals. Judge DANFORTH, who wrote the opinion in the latter court, says (p. 330): "It still remains that the plaintiff provoked the trespass; was himself guilty of the act which led to the disturbance of the public peace. Although this provocation fails to justify the defendant \* \* \* it may be relied upon by him in mitigation even of compensatory damages. This doctrine is as old as the action of trespass \* \* \* and is correlative to the rule which permits circumstances of aggravation, such as time and place of an assault, or insulting words, or other circumstances of indignity and contumely, to increase them. \* \* \* If the injury of which he complains came in part from his own act, there is less reparation demanded from the defendant, for the law seeks to do justice between the parties, and will not require one to atone for the other's error. If satisfaction is to be made for the breach of public order, it is not due to him, for his own wrong is the consideration upon which it stands, and for that he cannot be allowed to profit. Otherwise he would receive compensation for damages occasioned by himself." He cites with approval the case of *Robison v. Rupert* (23 Penn. St. 523). That was a case where the plaintiff was shot when, with others, he was annoying and disturbing the defendant, and after he had been warned to desist. The court charged the jury "that these circumstances should go in mitigation of exemplary damages, but that the plaintiff was entitled to full compensation for all his sufferings, losses and expenses, notwithstanding the character of the provocation by which he drew them on himself." The plaintiff had a verdict, and upon error brought by defendant the court reversed the judgment, saying, "where

there is a reasonable excuse for the defendant, arising from the provocation or fault of the plaintiff, but not sufficient entirely to justify the act done, there can be no exemplary damages, and the circumstances of mitigation must be applied to the actual damages."

The reason for this doctrine is well stated by Sedgwick in his well-known work on Damages (Vol. 2 [7th ed.], p. 521, note b) as follows: "The distinction as to the effect of mitigating circumstances on actual and on exemplary damages is, that where the excusing or palliating circumstances involve no fault of the plaintiff, they may prevent exemplary damages and limit the recovery to actual compensation. Where there is a reasonable excuse for the defendant, arising from the provocation or fault of the plaintiff, but not sufficient entirely to justify the act done, the circumstances of mitigation must be applied to the actual damages. If it were not so, the plaintiff would get full compensation for damages occasioned by himself. The rule ought to be, and is practically, mutual. Malice and provocation in the defendant are punished by inflicting damages exceeding the measure of compensation, and in the plaintiff, by giving him less than that measure."

There is some conflict of authority between the courts of the different States upon this question. One or two, notably Vermont (*Goldsmith v. Joy*, 61 Vt. 488) and Illinois (*Donnelly v. Harris*, 41 Ill. 126), have held that provocation can be considered only in mitigation of punitive damages. But I think the rule is otherwise in this State, and that the principle stated in *Kiff v. Youmans* must be followed here.

The respondent endeavors to distinguish the case at bar from that case, claiming that there the only question was whether punitive damages were lawfully allowed, which is not the question here, but I think in another respect the cases are alike in principle.

The plaintiff here was the editor of a newspaper; the defendant was president of the village of Waverly, where both resided. The defendant testified that on the same day, and prior to the assault, he had read some articles in plaintiff's newspaper severely criticising him, and that they made him very angry. If this evidence is true, it showed that the plaintiff here, like the plaintiff in the *Kiff* case, was at fault, and that the articles were the cause of the defendant's anger at the time of the assault. If the defendant's anger at that

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time was in fact provoked by plaintiff, the cases are not fairly to be distinguished in that respect.

I think that, under the authority of the *Kiff* case, the court erred in not permitting the jury to take the circumstances proven in mitigation by the defendant in reduction of actual or compensatory damages as well as of punitive damages, and for this reason the judgment must be reversed.

This conclusion renders the consideration of other questions unnecessary.

SMITH, and KELLOGG JJ., concurred ; CHASE, J., concurred in result ; PARKER, P. J., dissented.

Judgment and order reversed and new trial granted, with costs to appellant to abide event.

**Cases**  
DETERMINED IN THE  
**FOURTH DEPARTMENT**  
IN THE  
**APPELLATE DIVISION,**  
**December, 1902.**

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EDWARD SHORTSLEEVE, as Administrator, etc., of MARY ELLEN SHORTSLEEVE, Deceased, Appellant, v. HENRY H. STEBBINS, Respondent.

*Jury — evidence, although considered unreliable by the court, must be submitted to the jury — proof as to a death having resulted from an accident.*

Although the judge presiding at a jury trial may be impressed with the unreliability of a witness the jury are entitled to consider the testimony of such witness and, in connection with the other evidence in the case, to give it such weight as they may deem proper.

In an action to recover damages caused by the death of the plaintiff's intestate, it appeared that, as a result of the alleged negligence of the defendant, the intestate was, on August 2, 1899, thrown from a carriage upon her head and shoulders with considerable violence; that the night after the accident she suffered pain in her head, neck and shoulders; that for some time thereafter her husband continued to bathe the sore spots with witch hazel without relieving the pain; that, while attempting to perform her customary household duties, she suffered much pain; that in three or four weeks she was compelled to take to her bed; that on November third a physician was called who attended her from that time until she died; that shortly after the physician was called she gave premature birth to a deformed child; that subsequently she went into convulsions, in one of which she died early in January.

Her physician testified that, in his opinion, the convulsions resulted from an injury to her spine, and, in answer to a hypothetical question, expressed the opinion that the condition in which he found the intestate was due to the injuries she received at the time of the accident.

*Held*, that the question whether the accident was the cause of the intestate's death was one of fact for the jury.

APPEAL by the plaintiff, Edward Shortsleeve, as administrator, etc., of Mary Ellen Shortsleeve, deceased, from a judgment of the

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Supreme Court in favor of the defendant, entered in the office of the clerk of the county of Cayuga on the 11th day of November, 1901, upon the verdict of a jury rendered by direction of the court, and also from an order entered in said clerk's office on the 10th day of October, 1901, denying the plaintiff's motion for a new trial made upon the minutes.

This action was brought to recover damages for the death of the plaintiff's intestate which, it is alleged, was caused by the defendant's negligence.

On the 2d day of August, 1899, the plaintiff, with his wife and two small children, was driving in a low, one-horse, top phaeton along the highway leading from the city of Oswego to the village of Minetto. While descending a hill very near the latter place and at a point about 150 feet north of a stone viaduct or culvert the horse gave a start, breaking the whiffletree of the wagon, from which it soon broke loose, and the occupants of the wagon were presently thrown to the ground with considerable violence. Mrs. Shortsleeve struck upon her head and shoulders and her two children fell upon her.

Running along and by the side of and parallel to the highway was a cinder path five feet in width designed for the use of bicycles, and it appears that upon the day in question the defendant and his son were riding their wheels upon this path, and it is alleged that when they reached a point opposite the plaintiff's wagon the defendant left the cinder path and attempted to pass the plaintiff upon the highway, and that in doing so he ran into or close to the plaintiff's horse, in consequence of which the horse took fright with the result hereinbefore mentioned.

Mrs. Shortsleeve died upon the sixth day of January following the accident, and her death, it is claimed, was attributable to the injuries she had previously received.

Upon the trial a verdict was directed in favor of the defendant, at the close of the evidence, upon the ground that the plaintiff had failed to establish by satisfactory proof any negligence upon the part of the defendant, and from the judgment entered upon such direction, as well as from an order denying the plaintiff's motion for a new trial, this appeal is brought.

*Frank T. Miller*, for the appellant.

*D. P. Morehouse*, for the respondent.

ADAMS, P. J.:

The evidence of the defendant's negligence was not altogether satisfactory, and as the law was understood at the time of the trial the learned trial justice was doubtless justified in pursuing the course he did, provided he was convinced that he would be compelled to set aside a verdict if perchance one were rendered in favor of the plaintiff. Nevertheless it cannot be said that there was no evidence of any negligence upon the part of the defendant. The witness June testified that he saw the accident and that he observed the defendant come "straight out of the bicycle path and cut right across the road right in front of the horse so he hit the horse and the horse threw up his head;" that the horse then reared and broke the whiffletree and ran until he reached the culvert, when the occupants of the wagon were thrown out.

Upon his cross-examination this witness admitted that before the trial he had told the defendant's counsel that he knew nothing about the accident, and his evidence was so contradictory and unsatisfactory that the learned trial judge obviously gave it no credence whatever. While we are not prepared to take issue with the trial court upon this particular feature of the case, it is but fair to say that there was some other evidence given which it is claimed tended to support that of this witness.

The plaintiff testified that the defendant left the cinder path, and while he does not claim that he ran into the horse, he does say that he came in front of him upon his wheel without any warning and so close to his head as to frighten him; and it is conceded that after the accident the defendant voluntarily handed the plaintiff his card, telling him to have his wagon and harness repaired and he would pay for the same.

We think that, however the trial court may have been impressed with the unreliability of the witness June, the jury were entitled to consider his testimony and in connection with the other evidence in the case to give it such weight as they might deem proper (*People v. Chapleau*, 121 N. Y. 267; *Williams v. D., L. & W. R. Co.*, 155 id. 158; *Ten Eyck v. Whitbeck*, 156 id. 342); and that,

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in view of the rule which has been recently established by the decision of the Court of Appeals in the case of *McDonald v. M. S. R. Co.* (167 N. Y. 70), it was error to withhold the question of the defendant's negligence from the jury. This much was expressly conceded by the learned counsel for the defendant upon the argument, but it is now claimed that, even admitting the defendant's negligence, there is no evidence that it in any wise caused the death of the plaintiff's intestate.

This contention, in our judgment, cannot be sustained; for it appears that the night after the accident Mrs. Shortsleeve suffered pain in her head, neck and shoulders; that her husband bathed the sore parts with witch hazel; that this treatment was continued night and morning for some time thereafter without relieving the pain; that while attempting to perform her customary household duties, Mrs. Shortsleeve suffered much pain; that in three or four weeks after the accident she was compelled to take to her bed; that on the third day of November a physician was called, who attended her from that time until the day of her death; that shortly after the physician was called she gave premature birth to a child which was deformed, and that subsequently she went into convulsions, in one of which she died early in January. These convulsions her physician testified resulted, in his opinion, from an injury to her spine, and in answer to a hypothetical question he also expressed the opinion that the condition in which he found Mrs. Shortsleeve was due to the injury she received at the time of the accident.

In view of this evidence we fail to see how it can be claimed that the cause of her death was not a question of fact for the jury, and, therefore, it follows that a new trial must be granted.

Judgment and order reversed upon questions of law only and a new trial ordered, with costs to the appellant to abide the event, this court having examined the facts and found no error therein.

McLENNAN, SPRING and WILLIAMS, JJ., concurred; DAVY, J., not sitting.

Judgment and order reversed and new trial ordered, with costs to the appellant to abide event, upon questions of law only, the facts having been examined and no error found therein.



OCORR & RUGG COMPANY, Respondent, v. THE CITY OF LITTLE FALLS, Appellant.

CHARLES K. BENJAMIN, as Surviving Partner of the Firm of BUTLER & BENJAMIN, and Others, Respondents, Impleaded with ROLLIN H. SMITH and Others, Defendants.

*Contract to erect a school building in the city of Little Falls — its board of education is not a corporation — the city is liable on contracts made by the board — when a failure to obey a statutory provision as to contracting a city debt is not available to the city as a defense to such a contract — nor the absence of the formal consent of the architect — what subletting of work to be done under a city contract does not violate chapter 444 of the Laws of 1897 — waiver of an architect's certificate — the reopening of a case is discretionary.*

The board of education of the city of Little Falls and of the union free school district of the city of Little Falls, created by section 43 of the charter of that city (Laws of 1895, chap. 565, as amd.), whose powers and duties are defined partly by the charter and partly by the Consolidated School Law, is not a distinct corporate entity as is a board of education created by the Consolidated School Law, but is simply one of the agencies of the city, and a contract made by such board of education within the scope of its agency and within the provisions of the charter is binding upon the city.

In an action brought to foreclose a mechanic's lien for materials furnished under a contract for the erection of a school building made by the board of education of that city, the fact that the proposition to raise the sum (which was in excess of \$5,000) necessary for the erection of the school building was not submitted to the electors of the city, as required by section 80 of its charter, is not available to the city where it appears that such defense was not pleaded in its answer and that the money applicable to the discharge of the obligation incurred by the contract has been raised and is in the city treasury.

The city cannot escape liability upon the contract because a portion of the work was sublet by the contractor without the formal consent of the architect in violation of a clause contained in the contract where it appears that before the contract was made the contractor announced in the presence of the architect and the board of education his intention of subletting a portion of the contract work, and that no objection was made thereto either by the architect or the board, and that the sub-contractor had, with the knowledge of the architect and the board of education, performed his part of the work for over a year without objection and received partial payments therefor.

Chapter 444 of the Laws of 1897, providing that if any contractor to whom a municipal contract is let shall, without the previous written consent of the department or official awarding the same, assign, transfer, convey, sublet or otherwise dispose of his contract or his right, title or interest therein, or his power to execute such contract to any other person, company or corporation,

the municipal corporation shall be relieved and discharged from any and all liability and obligation growing out of said contract to said contractor, and to the person, company or corporation to whom he shall assign, transfer, convey, sublet or otherwise dispose of the same, is designed to prevent a party obtaining a municipal contract from assigning the whole or the substantial part of it to some one else and thus relieve himself from responsibility in respect thereto. It was not designed to prevent a practical mason who obtains a contract to erect a school building in a city from subletting the carpenter work to a practical carpenter.

Where a contract for the construction of a building provides that payments shall be made thereunder upon the certificate of the architect, and, during the performance of the work, the owner declares the contract forfeited and takes possession of the building for the purpose of completing the same, the production of the architect's certificate is not necessary to enable a person who furnished material used upon the work to maintain an action against the owner to foreclose his lien.

A motion, made upon a reference after the evidence had been closed, to allow the plaintiff's case to be reopened and permit him to offer additional evidence in chief, is addressed to the discretion of the referee.

APPEAL by the defendant, The City of Little Falls, from a judgment of the Supreme Court in favor of the plaintiff and certain of the defendants, entered in the office of the clerk of the county of Herkimer on the 11th day of January, 1902, upon the report of a referee adjudging that the plaintiff and the several defendants mentioned in the judgment had valid liens upon a school building in the city of Little Falls and were entitled respectively to recover the amounts mentioned therein, except from that portion of said judgment which reads as follows, viz.: "It is further adjudged and decreed that as against the defendants Rollin H. Smith, William R. Chapple, Jay S. Newell, George F. Girvan, George W. Boyle and M. A. Richards, the complaint be dismissed, without costs."

The action was commenced to foreclose a mechanic's lien filed by the plaintiff to secure a balance claimed to be due and owing to it for materials furnished to Messrs. Butler & Benjamin, as copartners, and to Charles K. Benjamin, as surviving partner, who were sub-contractors for doing the carpenter work in the erection of the Little Falls high and grade school building in the city of Little Falls, N. Y., under the defendant William G. Dove, who entered into a contract with the city of Little Falls, by certain individuals

named, who constituted the board of education of said city, for the erection and completion of said building.

*John D. Beckwith* and *S. H. Newberry*, for the appellant.

*John D. Lynn*, for the plaintiff and for the defendant Benjamin, respondent.

McLENNAN, J. :

The city of Little Falls is a municipal corporation created by chapter 565 of the Laws of 1895, which act, as amended, constitutes its charter. By the charter the territory within the limits of the city is made a union free school district, and provision is made for a board of education consisting of six members, its powers and duties being defined by the charter and the Consolidated School Law of the State. (Laws of 1894, chap. 556, as amd.) Such board of education was organized in accordance with the provisions of the act, and at all the times in question was composed of the persons designated as such and named as defendants in this action.

Early in the year 1898 the project of erecting a high school building in the city of Little Falls commenced to be agitated, with the result that at an adjourned special meeting of the board of education, held on the 1st day of February, 1898, a resolution was unanimously adopted authorizing the publication of the "notice prescribed by Section 9, Article 2, Title 8, of the Consolidated School Law, of special meeting of the legal voters of the school district to be held at Church street school house, Tuesday, March 8, 1898, at 7.30 p. m., to consider a proposition to build new school buildings on the site owned by the district and now occupied by the academy and Benton hall in the eastern division for the estimated sum of \$65,000, to be paid in annual installments of \$2,000 each," etc. A formal notice of such election, signed by all the members of the board of education, was prepared and published, and at the time mentioned the election was held, the president of the board calling the meeting of the electors to order. A chairman was chosen upon his motion. Upon motion of the chairman a secretary was chosen, and two tellers were selected to receive the ballots. Four hundred ballots were cast, of which three hundred and eleven were for and eighty-

nine against the proposition, and such result was duly certified to the board of education.

Thereafter the board caused plans and specifications to be prepared by an architect for the erection of a school building upon the site specified, which were duly approved, and it then advertised for proposals for doing the work in accordance therewith.

Thereafter, and on the 28th day, June, 1898, a contract was entered into "between William G. Dove (the defendant) of the city of Geneva, county of Ontario and State of New York, party of the first part, and the city of Little Falls, by R. H. Smith, E. J. Burrell, W. R. Chapple, Jay S. Newell, H. A. Tozer and F. G. Teall, Board of Education of the city of Little Falls, in that behalf, (duly authorized by a resolution of the Board of Education of said city, passed June 15th, 1898, and in pursuance of the laws of the State of New York) party of the second part." By such contract Dove, the party of the first part, agreed "to construct and finish in every respect, in the most substantial and workmanlike manner, the Little Falls High and Grade School Building, on the city property \* \* \* in full accordance with all the plans and specifications and the working drawings drawn and to be drawn by Archimedes Russell, architect, all of which forms a part of this contract, and to which strict reference shall be had in the construction of the building in all its parts." Concededly, the installation of the plant for heating the building was not included in the contract.

The party of the second part agreed to pay to Dove for the work to be done and materials furnished by him the sum of \$55,588.28; "each payment shall be made on the estimate and certificate of the architect, in sums not less than one thousand dollars, and at such times when the value of the materials furnished and the labor performed and in the building — less fifteen per centum — shall amount to one thousand dollars or more, and the remainder, or fifteen per centum of the whole contract price, shall be reserved and paid when the whole work is completed as herein agreed." Dove agreed "to commence the work herein contracted for within ten days after the signing of this agreement, and to complete the whole work to the entire satisfaction of the said party of the second part and architect, on or before the 1st day of August, 1899."

It was further provided that the first party should carry on the work under the direction of the architect, and should obey all his orders and directions in respect to the labor and materials and the quality of the same, and also as to the progress of the work. It was further "agreed that the said party of the first part shall not sub-contract any part of the work herein contracted for without the consent of the said architect." Also, "that in case of any failure to carry out the terms of this agreement by failure to carry on and complete the whole work at the time herein named and agreed to on the one part, or by the failure to pay the money as herein named and agreed to on the other part, the party so failing shall pay to the other party, as liquidated damage therefor, the sum of ten dollars for each and every day the work remains unfinished, or the money remains unpaid after the day or days herein named and agreed to."

The foregoing are all the provisions of the contract which have any bearing upon any issue involved in this action. The contract was signed by Dove and by the individuals constituting the board of education of the city of Little Falls, as such.

On the 6th day of August, 1898, Dove entered into a contract with the firm of Butler & Benjamin, then composed of William K. Butler and Charles K. Benjamin, and of which firm Benjamin is now the survivor, by which he, Dove, sublet to said firm all the work which he had undertaken to do under his contract with the city of Little Falls, except the mason work. In other words, he sub-contracted all the carpenter work, including the roofing and iron work connected therewith, Dove retaining all the mason work, which, according to the plans and specifications, included the excavation, foundation, outer walls and all inside brick work, plastering, etc., and Dove agreed to pay to Butler & Benjamin for the work to be done by them the sum of \$25,377.25, the agreement providing that all work should be done in strict accordance with the terms of the contract between Dove and the city, and that payment should also be made only as therein provided. No formal consent to the "sub-contracting" of the carpenter work was ever given by the architect or by the defendant's board of education.

Dove commenced work under his contract within ten days after it was executed and prosecuted the mason work, the work retained

by him, to completion, and, so far as appears, substantially to the satisfaction of the appellant. Butler & Benjamin also entered upon the performance of their sub-contract with Dove, and continued in the prosecution of their part of the work until about the 30th day of August, 1899, when they and all their workmen were ordered to cease work and to remove all their tools from the building. This was done pursuant to a resolution adopted by the appellant's board of education, which declared the contract entered into with Dove forfeited and abandoned, and forbade him to continue further in the performance of his contract, upon the ground, as stated in the resolution, that he had not completed the building on or before August 1, 1899, as provided in his contract, and because the work had not been done in accordance with the plans and specifications prepared by the architect, and as directed by him.

A copy of the resolution and notice of the action of the board was served upon the contractor, and no further work was done upon the building by him or by his sub-contractor. At the time work was stopped all the mason work had been completed, and the balance of the work, as found by the referee, was substantially completed, although the evidence is undisputed that the building was not then ready for occupancy; that a considerable amount of the interior finishing in many of the rooms had not been done.

The evidence tends to show that the value of the work done and materials furnished by Butler & Benjamin, before they were ejected from the building, was \$22,220. All of the lumber included in this estimate had not actually been put into the building, but the evidence is to the effect that it had been cut and prepared and was of no value for any other purpose. The mason work actually done at that time was of the value of at least \$27,764.70, which would make the entire value of the work done and materials furnished the sum of \$49,984.70, at the time the contract was declared forfeited.

There had been paid by the appellant to apply on the contract the sum of \$38,000, leaving a balance of \$11,984.70. The plaintiff, under a contract with Butler & Benjamin, furnished materials to the amount of \$8,997.96, which went into the construction of the building, or were prepared for that purpose and were made useless for any other. Of that amount the sum of \$4,852.53 had been paid, leaving the sum of \$4,145.43 due and owing to the plaintiff,

which is the amount for which its lien was filed. The amount due to the plaintiff, added to the amounts due to all the other lienors, as found by the referee, and the sums already paid by the appellant, is less than the amount which the evidence tends to show is the value of the work done and materials furnished in the construction of the school building. The evidence also shows that there are sufficient funds in the treasury of the appellant, applicable to and presumably raised for that purpose, to discharge all of said liens and all valid claims arising on account of the construction of the building in question.

The appellant resists the payment of the plaintiff's claim and the claims of the other defendants upon the grounds: *First*. That the contract in question was not the contract of the city, and that it incurred no liability on account of the same. *Second*. Because the contract for the erection of the school building was not legally authorized and as required by the provisions of the charter of the city. *Third*. Because William G. Dove, the person with whom the contract in question was made, had no right or authority to sublet the same or any part of the work provided for therein without the consent of the architect, which was not obtained, and, therefore, that it was in no manner liable to Butler & Benjamin, the subcontractors, or to any person or corporation furnishing materials to said firm, although used in the construction of the building, and also because such subletting is prohibited by chapter 444 of the Laws of 1897. *Fourth*. Because the building, without any fault on the part of the city, was not completed within the time specified in the contract, or at all, by the contractor. *Fifth*. Because the plaintiff did not furnish the certificate of the architect certifying the amount due and unpaid as required by the terms of the contract; and, *sixth*, the appellant insists that the judgment should be reversed because of alleged errors committed by the referee in the reception and rejection of evidence and for other rulings made upon the trial.

*First*, then, was the contract in question in fact the contract of the appellant, the city of Little Falls? By the charter the city of Little Falls constitutes a union free school district, known as "The Union Free School District of the city of Little Falls." (§ 5.) Among the elective officers of the city are three "school commissioners, the term of office of each of whom shall be three years, and

who shall receive no compensation for their services." (§ 11, as amd. by Laws of 1898, chap. 199.) The election of such commissioners and of all other elective officers "shall be conducted in all respects in the manner general elections in cities are by law required to be conducted, and all the provisions of law relative to such elections shall be applicable to the election for officers of the city." (§ 12, as amd. by Laws of 1898, chap. 199.) The appointive officers of said city include "three school commissioners, \* \* \* all of whom shall be appointed by the mayor, subject to confirmation by the common council." (§ 14, as amd. by Laws of 1896, chap. 13.) The term of office "of each appointive school commissioner (shall be) three years." (§ 15.) The school commissioners thus appointed shall not receive any compensation for their services. (§ 17, as amd. by Laws of 1898, chap. 199.) "The mayor may suspend, orally or by writing, for ten days or less at any one time, any officer of said city (including the three school commissioners appointed by him) appointed by the mayor with the confirmation of the common council, but he shall not suspend the same person more than twice in any one year." The common council may also remove said commissioners "for any cause by it deemed sufficient, upon charges, giving such officer (commissioner) reasonable notice thereof and a reasonable opportunity to be heard, and such officer may be suspended by the common council pending such investigation." (§ 19.) "If a vacancy shall occur otherwise than by expiration of term in any elective office of the city (including the three school commissioners), the common council shall appoint a person to fill such vacancy until the end of the official year in which said vacancy occurs. \* \* \* A vacancy occurring in any appointive office of the city, otherwise than by expiration of term, shall be filled for the balance of the unexpired term by the same authorities and in the same manner as an appointment for a full term." (§ 20.) "Whenever any expenditures to be made or incurred by the common council or any city board or officer in behalf of the city for work to be done or materials or supplies to be furnished, except ordinary repairing or macadamizing of streets, shall exceed two hundred dollars, the city clerk shall advertise for and receive proposals therefor in such manner as the common council or as the board or officer charged with making such



expenditure shall prescribe, and the contract therefor shall be let to the lowest responsible bidder," etc. (§ 33, as amd. by Laws of 1898, chap. 199.) It shall be the duty of the mayor "to exercise a constant supervision and control over the conduct of all city officers (including the six school commissioners), and he shall have power and authority to examine at all times the books, vouchers and papers of any officer or employe of said city." (§ 35). "The school commissioners of the city of Little Falls shall also be school commissioners of the union free school district of the city of Little Falls, and shall constitute the board of education of the city of Little Falls, and the board of education of the union free school district of the city of Little Falls. The superintendent of public instruction shall apportion the State school moneys to the city of Little Falls in the same manner as to cities having special school acts, and for that purpose this act shall be deemed a special school act, within the meaning of the Consolidated School Law." (§ 42.) "The aggregate for the annual tax levy for all purposes in this section specified (fire and police fund, poor fund, park and cemetery fund, etc.) shall not exceed the sum of fifty-three thousand dollars. In addition to the amounts which shall be included in the annual tax levy for the foregoing purposes, there shall also be included therein, for the purposes and uses of the board of education, such sum or sums as the board of education shall declare necessary in pursuance of general laws." (§ 53, as amd. by Laws of 1898, chap. 199.) The board of education shall "deliver to the mayor, on or before the fifteenth day of March in each year, a report of all expenditures made or incurred by such board during the preceding fiscal year, showing separately and by items the amount expended from each fund which may be drawn on by such board, the balance at the end of such year standing to the credit of each such fund; the amount which in the judgment of said board will need to be expended during the current fiscal year from each such fund with the items thereof and the reasons therefor, so far as practicable." (§ 54, as amd. by Laws of 1896, chap. 13.)

Section 55 (as amd. by Laws of 1896 chap. 13) provides, in substance, that the mayor of the city shall file the estimate of the board of education with the city clerk, and that the common council shall raise by taxation the amount so declared necessary by said board.

Section 58 (as amd. by Laws of 1898, chap. 199) provides that all accounts and claims against said city of whatever nature, except such as may be lawfully made, incurred and paid by the board of fire and police, the board of public works, the city board of charities or the board of education, shall be presented to the common council for audit.

Section 80 (as amd. by Laws of 1898, chap. 199) provides that the common council may purchase land and order the erection of buildings thereon.

Section 190 provides: "The city of Little Falls shall be liable for the bonded and other indebtedness of the village of Little Falls. The union free school district of the city of Little Falls shall be liable for the bonded and other indebtedness of union free school district number one of the towns of Little Falls and Manheim, and shall pay and discharge the principal and interest thereon as the same shall respectively fall due."

Section 195 provides that "the board of education of union free school district number one of the towns of Little Falls and Manheim shall be the board of education of the union free school district of the city of Little Falls until the board of education of the city of Little Falls is established."

Section 196 provides: "A special city election for the first election of all the elective city officers of said city, except recorder, shall be held within twenty days after the passage of this act. At such city election there shall be elected by the city at large a mayor, a treasurer, \* \* \* one school commissioner for the term of one year, one school commissioner for the term of two years, and one school commissioner for the term of three years."

Section 198 provides: "As soon as practicable after the completion of the canvass and the declaration of the result of the votes cast at such special election, the following city officers shall be appointed by the mayor with the confirmation of the common council, to wit: a city clerk \* \* \* four fire and police commissioners \* \* \* four commissioners of charities \* \* \* three school commissioners to hold office for one, two and three years respectively."

The foregoing are all the provisions of the charter of the city of Little Falls which in any manner relate to the board of education

of said city or to the duties or powers which may be performed or exercised by it. Many of them bear but remotely upon the questions now being considered, but it will be observed that the city is made a corporation. The board of education and the other departments of the city are created by the charter, but none of them are by it made corporations or clothed with corporate powers. The board of education is treated precisely the same as the other agencies of the municipality. It is not vested with the power to acquire or hold the title to property or to perform any corporate act separate and distinct from the city. It is required to report to the common council, in a detailed statement, the moneys necessary for the schools within the city. The city is then required to raise such moneys as are thus reported to be necessary by taxation levied and collected in the regular way, and when collected such sums go into the hands of the treasurer of the city and are by him credited to the board of education fund, and can only be expended by such board or by its direction (§§ 38, 54, 157 *et seq.* as *am.*). The powers and duties of the board of education, so far as they relate to the supervision, control and management of the schools, are prescribed by the Consolidated School Law or by other general or special statutes, and are not attempted to be in any manner regulated by the charter.

The learned counsel for the appellant does not contend that the charter contains any provision which makes defendant's board of education a corporation or authorizes it to hold the title to real estate or other property, but he insists that the board is a corporation, has a corporate entity and is vested with all the powers incident thereto by virtue of the provisions of the Consolidated School Law.

The Consolidated School Law declares that such boards of education as are therein provided for are bodies corporate, and they are clothed with the power, among others, to purchase a site or sites for a schoolhouse or schoolhouses, to take charge of the schoolhouses, sites, etc., within their respective jurisdictions, and title to the same is by the act vested in such boards. By the Consolidated School Law a board of education is authorized, among other things, to sell schoolhouse sites and other property; to purchase, take the title to and hold real estate and other property, and to cause the moneys necessary for the purchase of real estate, and for the erection

of schoolhouses thereon, to be levied upon the taxable property within its jurisdiction, and when collected to be expended in such manner as it may deem proper, subject to the restrictions of the act (Tit. 8). In other words, the boards of education created by the Consolidated School Law are bodies corporate in the broad sense, and are clothed with all the powers incident thereto and necessary to the performance of the duties imposed upon them by the act. It is apparent, however, that the boards of education created pursuant to the Consolidated School Law are not of the character of the board authorized by the defendant's charter, and their functions, except in so far as they relate to the management and control of the schools, are entirely different from those of defendant's board. The members of the boards of education provided for by the Consolidated School Law are elected by the qualified voters of their respective districts, and can only be removed for neglect or malfeasance in office. One-half of the members of defendant's board of education are appointed by the mayor, with the approval of the common council, and may be removed by them. The provisions for the filling of vacancies are entirely different in the two laws. The acts and expenditures of defendant's board are subject to investigation and examination by the mayor. The provisions relating to expenditures by defendant's board, and the machinery provided for the raising of the funds necessary for the proper maintenance of the schools within its jurisdiction, are entirely different from the provisions relating to those subjects which are contained in the Consolidated School Law. Many other radical differences might be pointed out. It is impossible to harmonize the provisions of defendant's charter with those of the Consolidated School Law upon the theory that the defendant's board of education has a corporate entity separate and distinct from the city itself, and that it is vested with the comprehensive powers possessed by boards of education created pursuant to the provisions of the Consolidated School Law.

A careful examination of the two acts leads us to conclude that the board of education of the city of Little Falls is not a corporation, but is simply one of the agencies of the municipal government, and that its acts, if within the scope of such agency and within the provisions of the charter, are the acts of the city. Without doubt many, if not all, of the duties of such board, so far as the actual manage-

ment and control of the schools are concerned, are prescribed by the Consolidated School Law, and the provisions of that act control when not in conflict with the charter or with any special law applicable thereto, but corporate power or a corporate entity is not essential to the full performance of all of such duties.

The decision in the case of *Reynolds v. Board of Education* (33 App. Div. 88) is not an authority for appellant's contention. It is true that in that case the learned justice who wrote the opinion said: "The defendant is a body corporate, created under the Consolidated School Law of this State."

That was the allegation contained in the complaint in that case, and the review in the Appellate Division involved only the correctness of the decision of the Special Term overruling a demurrer interposed by the defendant to the complaint, which of course admitted all of its allegations, so that the court in its opinion only stated an admitted fact, and one which must have been regarded as established for the purposes of that appeal. The decision in no manner indicates that the court concluded from an examination of the statutes that the board of education of the city of Little Falls was a corporation, or that such question was even considered by the court, but, as before said, the court assumed that the fact alleged in the complaint was true, as it was bound to do when considering the efficacy of the demurrer to such complaint.

We conclude that whatever act or thing the board of education of the city of Little Falls did in the name of the city, or for or on its behalf, if within the powers of the city, and if done in accordance with the provisions of its charter, were the acts of the city, and that the city alone is liable for the same. This seems to have been the interpretation placed upon the charter by the parties to the contract in question at the time it was executed. The contract was made between the defendant William G. Dove and the city of Little Falls. It is true it recited that it was made by such city by the persons, naming them, constituting the board of education, but clearly, upon its face, it was a contract between the city and Dove for the erection of the school building. It provided that the building should be erected upon a plot of ground of which the city of Little Falls owned the fee; that the building should be called "the Little Falls High and Grade School Building." It was to be erected

according to plans and specifications prepared by the architect. The contract price was \$55,588.28, and the city of Little Falls collected from its inhabitants, presumably by taxation levied in the usual way, the amount of the contract price, for the purpose of paying the contractor for the construction of the building; at least, it had sufficient money in its treasury applicable to that purpose. Under such circumstances it certainly would not be equitable to hold that the city of Little Falls incurred no liability because of the erection of the building, if it was erected and completed in accordance with the terms of the contract, and no provision of law was violated in respect thereto. We think the provisions of the charter to which we have referred do not require such holding, but that, on the contrary, the city of Little Falls was authorized, through its board of education, if the proper preliminary proceedings had been taken, to enter into the contract in question, and that in such case it would be liable for the obligations which it thereby incurred. In other words, that whatever obligation was incurred under or by virtue of the contract was incurred by the city of Little Falls.

Was the defendant, through its board of education, authorized by its charter to enter into the contract in question, and were the preliminary steps necessary to the exercise of such power complied with, or, if not, is the defendant now in a position to urge the failure of such compliance as a defense to this action?

Section 80 of defendant's charter (as amd. by Laws of 1898, chap. 199) provides: "The common council \* \* \* may order the construction of a new building or buildings upon lands owned by the city, if the expense thereof shall not exceed five thousand dollars. The common council may submit to the electors of the city at any annual or special city election the proposition to raise by tax, in addition to the amount otherwise allowed by law to be raised in each year, a sum specified for the purchase by the city of real property, the construction by the city of a new building or buildings, for paving or for any other special purposes. Notice that such proposition will be submitted at such election shall be published in the official newspapers of the city at least once a week for three successive weeks next prior to the holding of such election, which notice shall specify the form of ballot

for and against such proposition to be used at such election. If a majority of the electors voting on such proposition at such city election shall vote in favor of such proposition, the amount so voted may all be raised by tax in one year, \* \* \* or the said amount or any part thereof may be borrowed on the credit of the city in the discretion of the common council."

It is then provided that, in case it is determined to borrow such sums, bonds may be issued therefor, but it is provided that the amount so raised by tax or sale of bonds shall be devoted to the purpose for which such tax was voted and to no other purpose.

It must be conceded that the proposition to raise the sum for the construction of the building in question was not submitted to the electors of the city of Little Falls by its common council or by its authority. The election which was held was not authorized by the common council; it was not held in accordance with the provisions of the charter, and, therefore, could have no binding force as against the city, so that the question is presented whether or not that fact is available to the defendant as a defense to this action. We think it is not for the reason, *first*, because it was not pleaded in the defendant's answer or the illegality of the contract in any manner asserted; and, *second*, because the money, as appears by the uncontradicted evidence, applicable to the discharge of the obligation incurred by the contract had been raised and was in the treasury of the defendant for that purpose. The defendant having raised the money presumably by taxation to discharge such obligation, is not in a position to assert that such funds were procured by it illegally and without authority of law, whatever might have been the rights of a taxpayer in an action properly brought to test that question.

In the complaint it is alleged that the contract was made, was duly authorized, and recovery was asked upon and by virtue of it. The answer of the appellant admits the making and execution by the parties thereto of a certain contract, a copy of which is annexed and marked Exhibit A, and denies that any other or different contract or agreement was made or entered into. Exhibit A is the contract which is set forth and referred to in plaintiff's complaint. The answer in no manner alleges that the contract was invalid or was made without authority, and in no manner sets up

the defense now urged by the appellant. We think if the appellant wished to urge the illegality of the contract as a defense to this action, it should have pleaded such defense in its answer.

In *Milbank v. Jones* (127 N. Y. 376) the court said: "This rule has been enforced so long that it seems unnecessary to support it at this time by an extended reference to the decisions, and we shall, therefore, end the discussion by citing a few of the cases in which the courts of this State have said that a defendant, in order to avail himself of facts not appearing on the face of a contract to establish its invalidity, must plead it."

In *May v. Burras* (13 Abb. N. C. 384) the court said: "Where a defendant wishes to defeat a recovery by plaintiff, upon the ground that the contract upon which he is sued is illegal, the necessary facts must be alleged in the answer as well as proven upon the trial."

And at page 388 the court further said: Where "a party needs the aid of the statute to show that it is \* \* \* illegal, \* \* \* he must plead it."

In *Stafford Pavement Co. v. Monheimer* (41 N. Y. Super. Ct. 184) it is said that the invalidity of the contract cannot be raised "when the answer expressly admits the making and existence of the contract, and contains no allegations apprising the plaintiff that the nullity of the contract is meant to be relied on."

Many other cases might be cited to the same effect; indeed, the reason for the rule is so apparent that the citation of authority would seem to be unnecessary. The contract in suit was valid upon its face. The defendant admitted that the contract was made as alleged, and nothing was contained in the answer which could in the least apprise the plaintiff that the defendant intended to assert its invalidity upon the trial. No motion was made to amend the answer, and we think the defense that the contract was invalid because the proposition to raise the money to pay the expense of the building constructed was not submitted to the electors, as required by the charter, was not available to the defendant.

Did the architect, in fact, consent that Dove might sub-contract the carpenter work, and, even if he did, does chapter 444 of the Laws of 1897 prohibit such sub-contracting, and render the original contract non-enforceable? The evidence shows that when Dove was



with the members of the board he informed them and the architect that if he got the contract Butler would do the carpenter-work. In fact, Butler, who was a practical carpenter, was present at the time, figuring upon the plans to ascertain what it would be worth to do the carpenter work. Neither the architect nor any member of the board made any objection when Dove stated that he intended to sublet that work. On the contrary, it is apparent that all the parties, including the architect, understood that would be done.

Under those circumstances the appellant cannot successfully urge the invalidity of the contract because such work was sublet. During the entire construction of the building, covering a period of more than a year, the appellant's board and the architect knew that Butler & Benjamin were performing labor and furnishing materials for the building in question as sub-contractors; they were treated as such; partial payments were made to them upon estimates of the work done by them. So far as appears no complaint was ever made because the carpenter work was sublet, until the parties entered upon the trial of this action. The consent of the architect was in effect given, but if it was not the defendant is not in a position to urge the invalidity of the contract for that reason. A party may not, with full knowledge of all the facts, have the benefit of work done and materials furnished by a sub-contractor without objection, and then urge as an excuse for not paying for the same that the sub-contract was not consented to by him.

Chapter 444 of the Laws of 1897 provides, in substance, that if any contractor to whom a municipal contract is let shall, without the previous written consent of the department or official awarding the same, assign, transfer, convey, sublet or otherwise dispose of his contract or his right, title or interest therein or his power to execute such contract, to any other person, company or corporation, the municipal corporation shall be relieved and discharged from any and all liability and obligation growing out of said contract to said contractor, and to the person, company or corporation to whom he shall assign, transfer, convey, sublet or otherwise dispose of the same.

The statute did not prohibit Dove from subletting the carpenter work involved in the contract in question. The prohibition is against assigning, subletting, etc., the whole or the substantial part

of a contract entered into with a municipality, so as to put it out of the power of the original contractor to perform the same. The construction contended for by the appellant would require a contractor, in order to perform a contract entered into with a municipality involving a variety of work, to do substantially all of it by day's labor. In case of a contract for the erection of a building complete the contractor could not contract for the steam heating or plumbing or for the painting or tinning, but every part which he himself could not perform must be done by day's labor.

We find no authority bearing upon this precise proposition, but we think the construction of the statute contended for by the appellant is unreasonable and such as was not intended by the Legislature in the passage of the act. It is evident that the act was passed for the purpose of preventing a sort of brokerage in city contracts; to prevent a party from obtaining a contract from a municipality and then assigning the whole of it to someone else, and thus relieve himself of responsibility in respect thereto. In the case at bar the usual custom was pursued, the legality of which, so far as we are aware, has never been questioned, to wit: In case a contract is awarded by a city to a practical mason for the erection of a brick building, he does the mason work, builds the foundation and erects the walls, and sublets the carpenter work to a practical carpenter, the plumbing work to a plumber, and so on, always retaining, however, a substantial part of the contract to be performed by himself and all to be done under his direction and supervision, for the performance of every detail of which he is accountable to the municipality. The fact that the carpenter work upon the building in question was sub-contracted does not, under the facts disclosed by the evidence in this case, constitute a defense which is available to the appellant.

The learned counsel for the appellant urges with much earnestness that the findings of the learned referee to the effect that the contractor and the sub-contractor proceeded with the work in a proper manner and in good faith until the 30th day of August, 1899, when the appellant, without cause, took possession of said building and refused, without cause, to allow them to complete the same; that at that time the mason work was substantially completed and the carpenter work nearly completed; that the appellant was

responsible for the non-completion of the building at the time specified in the contract, and that said contractors were at all times ready and willing to perform said contracts, are not supported by evidence.

It is somewhat singular and perhaps significant that the appellant gave no evidence upon any question involved in the findings of the learned referee. No witness was called by or on behalf of the appellant, and, therefore, the evidence given on behalf of the plaintiff stands wholly uncontradicted. The case seems to have been tried upon technicalities and not upon the merits. The evidence of performance is not altogether satisfactory. Precisely what was done and what was omitted in the construction of the building does not definitely appear. The general statement is made by the witnesses called by the plaintiff that the work was substantially completed. On cross-examination it was shown that certain items of work were unfinished, but whether they were trivial or important the appellant did not attempt to show, and it does not appear.

The same may be said with reference to the action of the appellant in ejecting the contractors from the building, and in declaring the contract forfeited. The plaintiff's witnesses state, in effect, that such action on the part of the city was entirely without excuse, and through no fault of theirs; that the building was not fully completed by the first day of August solely through the fault of the city, and because it failed to properly heat the building, which was necessary in order to enable them to perform their work, and that solely as a result of such failure the completion of the building was delayed at least six weeks. Not a word of proof is offered by the appellant to controvert the statements made by the witnesses called by the plaintiff. No explanation is offered for the action on the part of the city in ejecting the contractors from the building.

Certainly a defense to plaintiff's alleged cause of action was not established simply because it appeared that the building was not completed within the time specified in the contract. If the failure to complete was caused by the city or by its agents, the contractors were relieved from responsibility. (*Smith v. Wetmore*, 167 N. Y. 239.)

Upon this branch of the case it need only be added that, after a careful examination of the evidence, we are satisfied that it was sufficient to support the findings of the referee, especially in view

of the fact that the appellant offered no proof upon the issues involved.

The same may be said in respect to the findings of the referee relating to the amount of work done upon the building and its value, and as to the value of the work done and materials furnished by the plaintiff, by Butler & Benjamin and by Benjamin as surviving partner, and the amount and value of the materials made ready for use by them but not actually used in the construction of the building through the fault of the appellant. With reference to those matters the evidence is general, is not explicit, but again no effort is made by the appellant to contradict it, although all the facts were within its knowledge. The appellant knew just what condition the school building was in, what work had been done, what materials had been furnished, what such materials were worth; knew what remained undone and what materials had not been furnished and which were called for by the contract and their value; what it would cost to have completed the building according to the contract, but it did not deem it important to disclose to the referee what was within its knowledge with reference to those matters, and we must, therefore, assume that it knew of no facts which would aid it upon the trial of the issues involved.

The findings of fact by the referee being supported by evidence should not be disturbed upon this appeal.

The production of the architect's certificate showing the amount due to the contractor was not essential in order to entitle the plaintiff to maintain this action. The appellant having declared the contract forfeited and the performance of the work thereunder abandoned, and having taken possession of the building for the purpose of completing the same, it was not necessary for the plaintiff to furnish the certificate of the architect. (*Campbell v. Coon*, 149 N. Y. 556.)

Counsel contends that the referee committed reversible error in permitting the case to be reopened upon plaintiff's motion, after the evidence had been closed, and to receive evidence in chief. The motion to reopen was, under all the circumstances, addressed to the sound discretion of the referee. (*Wright v. Reusens*, 133 N. Y. 298.) We think the discretion was properly exercised in this case.

Our conclusion that the board of education of the city of Little Falls is, so far as the questions involved in this case are concerned, simply an agency of the city, and was such agent in the erection of the building in question, renders it unnecessary to consider the exceptions which were taken upon the theory that the acts of the board were not binding upon the city, and that proof of transactions had with the board was inadmissible as against the city. The other exceptions to which attention has been called do not present reversible error.

It follows that the judgment appealed from should be affirmed, with costs.

SPRING, WILLIAMS and HISCOCK, JJ., concurred; DAVY, J., not voting.

Judgment affirmed, with costs.

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JOHN C. LEGGETT, as Executor, etc., of MINERVA P. STEVENS, Deceased, Appellant, v. ADDISON S. STEVENS, both Individually and as Administrator with the Will Annexed of WILLIAM P. STEVENS, Deceased, Respondent, Impleaded with HELEN S. ELDRIDGE, Appellant, and Others.

*Demurrer — not sustained on a ground not specified therein — when an executor has legal capacity to sue — interest of an executor's executor in the construction of the original testator's will — statement of a cause of action in equity.*

If the ground of objection specified in a demurrer to a complaint is not good, the demurrer cannot be sustained because of another defect in the complaint not specified in the demurrer.

The complaint in an action brought by the executor of Minerva P. Stevens, deceased, against Addison S. Stevens, individually and as administrator with the will annexed of William P. Stevens, deceased, Helen S. Eldridge and others, alleged that William P. Stevens died leaving him surviving his wife, Minerva P. Stevens, his son, Addison S. Stevens, and an adopted child, Helen S. Eldridge; that his will provided: "*Third.* I give my wife, Minerva P. Stevens, the use of ten thousand (\$10,000) dollars for her own comfort and support, and she may use the whole principal sum of ten thousand dollars, and what is left at her death, after all her debts and funeral expenses are paid, shall be equally divided between my adopted daughter, Helen S. Eldridge, wife of Rufus C. Eldridge, if she is living; if she has children, to go to them; if not, to go to my nearest akin on my side. \* \* \*

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"*Fifth.* \* \* \* I also give my wife, Minerva P. Stevens, two thousand (\$2,000) dollars in addition to the above mentioned, and on the same conditions above mentioned, that is, the use;" that Addison S. Stevens and Minerva P. Stevens were duly appointed administrators with the will annexed of the said William P. Stevens, deceased, and that, as such administrators, they paid over to Minerva P. Stevens \$12,000 in property and securities in full discharge of the legacy; that Minerva P. Stevens died while there remained in her hands of such legacy, \$7,000 in securities and \$1,500 in cash, which represented the proceeds of other securities; that she left a will by which she devised all of her property to the defendants Jepson and appointed the plaintiff sole executor thereof; that the plaintiff had duly qualified as such executor and had distributed all of the property which had come into his hands except the property which had come to his testatrix from the estate of William P. Stevens, deceased; that the defendant Addison S. Stevens, claiming as residuary legatee under the will of William P. Stevens, deceased, demanded that payment be made to him; that the defendant Helen S. Eldridge, also claiming to be entitled thereto under the will of William P. Stevens, deceased, demanded that all of such property be turned over to her; that the defendants Jepson, claiming under the residuary clause of the will of Minerva P. Stevens, deceased, demanded that the property be paid over to them, or that portion thereof which consisted of notes and cash.

The complaint further alleged that the plaintiff was unable to determine to which of the parties he should pay the money, and that he desired the aid and instruction of the court as to his duty in the premises.

The defendant Addison P. Stevens, both individually and as administrator with the will annexed of William P. Stevens, deceased, interposed a demurrer to the complaint on the following grounds: "*First.* That the plaintiff has no legal capacity to sue, in that he, as executor of the will of Minerva P. Stevens, deceased, has no interest in the will of William P. Stevens, deceased, or in its construction, or in the distribution of his estate. *Second.* That the said complaint does not state facts sufficient to constitute a cause of action."

*Held*, that the demurrer should be overruled;

That, as the plaintiff was duly appointed executor of the will of Minerva P. Stevens, deceased, and was acting as such at the time of the commencement of the action, he had legal capacity to sue;

That the complaint stated a cause of action of which some court had cognizance, and that the question whether the equity branch of the Supreme Court had jurisdiction was not raised by the demurrer interposed;

That, aside from the form of the demurrer, the complaint stated a cause of action of which the equity branch of the Supreme Court had jurisdiction;

That the rule that an executor of an executor has no interest in the construction of the will of the first testator does not apply in a case where the construction of the will of the first testator is necessary in order to enable the executor of the first executor to discharge the duties of his office.

APPEAL by the plaintiff, John C. Leggett, as executor, etc., of Minerva P. Stevens, deceased, and by the defendant Helen S.

Eldridge, from a judgment of the Supreme Court in favor of the defendant Addison S. Stevens, both individually and as administrator with the will annexed of William P. Stevens, deceased, entered in the office of the clerk of the county of Allegany on the 5th day of September, 1902, upon the decision of the court, rendered after a trial at the Allegany Special Term, sustaining said Addison S. Stevens' demurrer to the complaint.

Also an appeal by the plaintiff, John C. Leggett, as executor, etc., of Minerva P. Stevens, deceased, from an order bearing date the 2d day of September, 1902, and entered in the office of the clerk of the county of Allegany, granting the demurring defendant an extra allowance of \$150.

*Harry E. Keller*, for the plaintiff, appellant.

*Frank B. Church*, for the appellant Helen S. Eldridge.

*W. J. Wetherbee*, for the respondent.

McLENNAN, J. :

So far as material to note, the allegations of the complaint are that one William P. Stevens, a resident of Cuba, Allegany county, N. Y., died on the 18th day of April, 1896, seized and possessed of certain real and personal property, leaving a last will and testament which was duly admitted to probate, and leaving him surviving his wife, Minerva P. Stevens, and his son, Addison S. Stevens, his only heir at law and next of kin, and the defendant Helen S. Eldridge, who sustained to him the relation of child; that Addison S. Stevens and the widow, Minerva P. Stevens, were duly appointed administrators with the will annexed of the said William P. Stevens, deceased, and duly qualified and entered upon the discharge of their duties as such; that they, as such administrators, fully administered the estate of the deceased, paying all the debts, all the legacies, and the expenses of administration; that as such administrators they paid over to the widow, Minerva P. Stevens, plaintiff's testatrix, \$12,000 in full discharge of the legacy for that amount devised to her by said will; that such devise in the will, which is made a part of the complaint, is contained in the 3d and 5th provisions thereof, as follows:

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"*Third.* I give my wife, Minerva P. Stevens, the use of ten thousand (\$10,000) dollars, for her own comfort and support and she may use the whole principal sum of ten thousand dollars, and what is left at her death, after all her debts and funeral expenses are paid, shall be equally divided between my adopted daughter, Helen S. Eldridge, wife of Rufus C. Eldridge, if she is living; if she has children, to go to them, if not, to go to my nearest akin on my side. \* \* \*

"*Fifth.* \* \* \* I also give my wife Minerva P. Stevens two thousand (\$2,000) dollars in addition to the above mentioned, and on the same conditions above mentioned, that is, the use."

The complaint in substance alleges that after such legacies had been fully paid to Minerva P. Stevens by the delivery to her of property and securities, and while at least \$7,000 of such securities were actually in her possession, and about \$1,500 in cash, the proceeds of other securities delivered to her, she, on the 27th day of June, 1901, at the village of Cuba in said county of Allegany, died, also leaving a last will and testament, which is also made a part of the complaint, and by which she devised all her property to the other defendants named respectively, and appointed the plaintiff sole executor thereof; such will was duly admitted to probate, and said executor immediately entered upon the discharge of his duties and took possession of all the property which was in the possession of Minerva P. Stevens at the time of her decease.

It is further alleged in the complaint, in substance, that the plaintiff, as executor of the estate of Minerva P. Stevens, deceased, has paid all the debts, has paid and discharged all the specific legacies mentioned in the will, and has distributed all the property of which his testatrix died seized in accordance with the terms of such will, except the property or the proceeds of the property which came to her from the estate of William P. Stevens, deceased, all of which is now in his hands; that as to such property the defendant Addison S. Stevens demands that the same be paid over and transferred to him, claiming to have become entitled thereto as residuary legatee under the will of William P. Stevens, deceased, upon the death of plaintiff's testatrix and the termination of her life estate; that the defendant Helen S. Eldridge demands that all of such property be turned over to her, also claiming to be entitled thereto under and



by virtue of the will of William P. Stevens, deceased; "that the defendants Enos P. Jepson, Dyer Jepson, Andrew Jepson and Lewis Jepson claim that all of the said twelve thousand dollar legacy now remaining, and especially the notes and cash mentioned above as exceeding \$1,500 in value, and including all interest which accrued on the funds of the said legacy up to the time of her death, whether the same had been paid or not, should be paid to them under the residuary clause of her will."

It is further alleged in the complaint that the plaintiff as executor "holds said securities, notes and money in trust for the person or persons entitled thereto under said wills, and he is unable to decide as to the rights of the persons claiming the same or some part thereof, and cannot safely pay the same over to either or any of them, and therefore desires the aid and instruction of this court as to his duty in the premises; that it is doubtful if the Surrogate's Court would have complete jurisdiction of all the issues presented by this action, and he comes into this court under its equity jurisdiction so that complete justice may be done in the premises, and a multiplicity of legal proceedings be avoided, and to that end has made parties hereto all the persons interested in the estate of both decedents."

The defendant Addison P. Stevens, both individually and as administrator with the will annexed of William P. Stevens, deceased, demurred to the complaint on the ground: "*First*. That the plaintiff has no legal capacity to sue, in that he, as executor of the will of Minerva P. Stevens, deceased, has no interest in the will of William P. Stevens, deceased, or in its construction, or in the distribution of his estate. *Second*. That the said complaint does not state facts sufficient to constitute a cause of action."

The learned trial court made its decision sustaining the demurrer, and from the judgment entered thereon this appeal is taken.

We think the demurrer should have been overruled. The first ground of demurrer, "that the plaintiff has no legal capacity to sue," is untenable. The case of *Ward v. Petrie* (157 N. Y. 301) must be regarded as decisive of this question. In that case the court clearly pointed out the distinction between "incapacity to sue" and insufficiency of facts to sue upon. The court said: "Incapacity to sue exists when there is some legal disability, such

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as infancy or lunacy, or a want of title in the plaintiff to the character in which he sues. The plaintiff was duly appointed receiver, and has a legal capacity to sue as such, and, hence, could bring the defendants into court by the service of a summons upon them, even if he had no cause of action against them. \* \* \* Incapacity to sue is not the same as insufficiency of facts to sue upon."

In the case at bar the plaintiff was duly appointed executor of the will of Minerva P. Stevens, deceased, and was acting as such at the time of the commencement of this action. He, therefore, had legal capacity to sue as such and, hence, could bring the defendants into court by the service of a summons upon them.

Are the facts stated in the complaint sufficient to constitute a cause of action?

In the case of *Sage v. Culver* (147 N. Y. 241) the court said: "When a complaint is met by a demurrer on the ground of insufficiency, the question always is whether, assuming every fact alleged to be true, enough has been well stated to constitute any cause of action whatever. \* \* \* The pleading will be held to state all facts that can be implied from the allegations by reasonable and fair intendment, and facts so impliedly averred are traversable in the same manner as though directly stated."

We think it clear that the complaint in the case at bar states a cause of action of which some court has cognizance, and whether or not the equity branch of the Supreme Court has jurisdiction or the power to grant the relief prayed for, or any relief, is technically not raised by the demurrer interposed. That question could only be raised under the second ground of demurrer specified in section 488 of the Code of Civil Procedure, "that the court has not jurisdiction of the subject of the action." It has often been held that if the ground of demurrer specified is not good, the demurrer cannot be sustained because of another defect in a pleading not specified in the demurrer. (*Carter v. De Camp*, 40 Hun, 258; *Town of Mount Morris v. King*, 77 id. 18.) But the demurrer in this case seems to have been disposed of by the learned trial court, as appears by his memorandum of decision, upon the theory that a court of equity had no jurisdiction to grant relief upon the facts stated in the complaint. The court below said: "I am of the opinion that the plaintiff cannot maintain this action. It proceeds upon the

assumption that an executor of an executor is authorized to administer the estate of the first *testator*, which is not the law of this State."

And after citing *Matter of Moehring* (154 N. Y. 423) and other authorities, the court said: "The plaintiff as the executor of Minerva Stevens should proceed to an accounting in the Surrogate's Court, and take the direction of that court as to the disposition of this fund."

Without reference to the technical form of the demurrer, the question will be considered whether or not the plaintiff's complaint states a good cause of action in equity, and entitles him to the relief demanded.

Stripped of all technicalities, the action has to do with about \$9,000 worth of property, consisting of securities and of cash, the proceeds of securities which were in the hands of plaintiff's testatrix at the time of her decease, and which came to her from her husband's estate in accordance with the terms of his will, and which was paid to her by the administrators, in full discharge of the bequests made to her. By the terms of such bequests she was entitled to use the income and all of the principal "for her own comfort and support; \* \* \* what is left at her death, after all her debts and funeral expenses are paid, shall be equally divided," etc. Under those conditions, when the administrators with the will annexed of William P. Stevens, deceased, paid over the legacies of \$12,000 to plaintiff's testatrix, they parted with all interest in such fund as administrators, and they or the survivor of them, as such, had no power or authority to again take possession of the same, and to distribute what remained after the life estate terminated. When the administrators paid over the amount of these bequests to plaintiff's testatrix, they parted with all their interest in it as such administrators, and left the fund to follow the course directed by the will of William P. Stevens, deceased. (*Smith v. Van Ostrand*, 64 N. Y. 278; *Matter of McDougall*, 141 id. 21.)

It will be remembered that the complaint alleges that the administrators with the will annexed "thereupon promptly entered upon the discharge of their duties as such, and the estate of the said William P. Stevens, deceased, was by them fully administered, and all the expenses of such administration, all the debts owing by the said William P. Stevens, and all the legacies set forth in his will

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were fully discharged and paid, and particularly the sum of twelve thousand dollars (less the transfer tax thereon) was on or about the 1st day of May, 1896, fully paid over to said Minerva P. Stevens by the said Addison S. Stevens, as administrator with the will annexed, in full discharge of the legacy of that amount to her, and that such payment was made in notes, bonds and mortgages."

Upon such payment being made, as alleged in the complaint Minerva P. Stevens became trustee for the remaindermen of the fund during the continuance of her life. (*Matter of Ungrich*, 48 App. Div. 594; *affd.*, 166 N. Y. 618.) And upon her death her executor became charged with the duties of such trustee.

The counsel for the respondent urges that Minerva P. Stevens could only have possession of the \$12,000 fund as one of the administrators, but the trouble with such contention is that whatever the fact may be, the complaint alleges that it was paid over to her in discharge of her legacy, and, if paid as alleged, it could never again vest in the administrator.

The rule is well settled, as stated by the learned trial court, that an executor of an executor is not authorized to administer the estate of the first testator, and such executor has no interest in the construction of the will of such first testator. This is true unless such construction be necessary in order to enable such executor to discharge the duties of his office.

Such is precisely the case at bar. The plaintiff states in his complaint, in substance, that he has about \$9,000 in his possession, property left by his testatrix; that different parties are claiming such property or money, each claiming to own the same; one by virtue of the will of William P. Stevens, deceased; another by virtue of the same will, and others by virtue of the will of his testatrix, and by reason of such divers claims he states that he is unable to determine to whom the funds so held by him should be paid, and he asks the instruction of a court of equity.

Addison S. Stevens, the surviving administrator of William P. Stevens, deceased, has no claim upon the fund as such administrator. He simply stands in the place of an individual, and may properly claim that as an individual remainderman he is entitled to have such fund paid to him. In order to determine which of the claimants are entitled to the fund it will be necessary to construe

the will of William P. Stevens, deceased, and when that is determined the fund will be paid to them, and not to the administrators or the surviving administrator for distribution. A court of equity is the proper tribunal to settle these conflicting claims, and the plaintiff ought not to be put to the hazard of paying to one claimant as against another, except under the advice and direction of the court.

It is urged that the plaintiff should proceed to an accounting in Surrogate's Court, and take the direction of that court as to the disposition of the funds in his hands. We think, to say the least, that the authority of the surrogate to adjust the entire controversy between the parties to this action is doubtful, but without passing upon that question, as it is not in any manner raised by the demurrer, we think that a court of equity has ample power to adjust all the matters in dispute between the parties, and that the plaintiff is entitled to its advice and instruction with reference to the disposition of the funds in his hands, referred to in the complaint.

The conclusion is reached that the plaintiff has legal capacity to sue; that the facts stated in the complaint are sufficient to constitute a cause of action, and it follows that the judgment sustaining the demurrer should be reversed, with costs of this appeal, with leave, however, to the defendant to answer the complaint within twenty days upon payment of the costs of this appeal. Having reached this conclusion, it follows that the order for the extra allowance should also be reversed.

ADAMS, P. J., WILLIAMS and HISCOCK, JJ., concurred; SPRING, J., not voting.

Judgment and order reversed and demurrer overruled, with costs, with leave to the defendants to withdraw demurrer and answer upon payment of the costs of the demurrer and of this appeal.

CATHERINE STIRLING, Respondent, v. BRIDGET KELLEY, Individually and as Administratrix, etc., of PATRICK KELLEY, Deceased, and Others, Defendants, Impleaded with MATTHIAS J. KELLEY, Appellant.

*Witness — right of, to explain testimony previously given by him — when it does not involve a personal transaction with a decedent — form of question.*

In an action brought by an heir at law of an intestate to partition property of which the intestate died seized, one of the defendants, a son of the intestate, alleged that he and his father had been copartners, and that the real property in question was a part of the copartnership property.

Upon the trial it appeared that in a prior action brought to foreclose a mechanic's lien against the property both the intestate and his son were witnesses, and that the son testified that the premises belonged to his father, and that he was working for him. The son was thereupon placed upon the stand, and after his attention had been directed to the testimony given by him in the former action he was asked if he had "anything to say in explanation of that evidence." The question was excluded upon the ground that, as the intestate was present in court at the time the testimony in question was given, the witness was disqualified by section 829 of the Code of Civil Procedure from giving any explanation thereof.

*Held*, that the exclusion of the explanatory evidence was erroneous, as the testimony given by the witness on the former trial involved no communication between the witness and his father, and also because it is a general principle of evidence that when the preceding testimony of a witness has been received in evidence it is always subject to explanation by him;

That the fact that the witness' counsel did not indicate the character of his proposed explanation did not warrant the exclusion of the evidence.

APPEAL by the defendant, Matthias J. Kelley, from an order of the Supreme Court, made at the Erie Trial Term and entered in the office of the clerk of the county of Erie on the 10th day of May, 1902, denying said defendant's motion to set aside the verdict of a jury in favor of the plaintiff and for a new trial made upon the minutes.

*Harry D. Williams*, for the appellant.

*August Becker*, for the respondent.

SPRING, J. :

The action is partition brought by one of the heirs at law of Patrick Kelley, deceased, intestate, for the division of several tracts of valuable real estate in the city of Buffalo.

The appellant, Matthias J. Kelley, a son of the decedent, answered, asserting that he and his father had been copartners in business for many years and that the real estate in question was purchased from the avails and profits of this copartnership and with the understanding that while the title was taken in the father, it was embraced within their copartnership, and that an undivided one-half thereof belonged to the son, and asked for an accounting and a partition of said lands in recognition of said copartnership. The controversy, therefore, centered around the issue as to the existence of this copartnership, and it involved a fair question of fact which was submitted to the jury upon a specific written question.

It appeared that in 1877 one Higham, a contractor, had erected a building upon the Kelley premises, and in an action to enforce a mechanic's lien filed by him, both Kelley and his son were witnesses. The testimony given by the former upon that trial was received in evidence without objection, wherein he stated that he owned a part of the property in suit. The testimony given by the son in that case was also received, in which he testified that these premises belonged to his father; that the father owned the grocery and that he, the son, was working for him. The appellant was thereupon placed upon the stand, and after his attention had been directed to this testimony he was asked if he had "anything to say in explanation of that evidence." This was objected to and excluded upon the ground that the witness was disqualified from giving any explanation, under section 829 of the Code of Civil Procedure, as his father was present in court at the time that evidence was given.

We think the objection is untenable. The testimony was given in a public trial and involved no communication between the father and the son. Beyond that, it is a general principle of evidence that when a witness' preceding testimony or declaration has been adduced, it is always subject to explanation by him. (*Nay v. Curley*, 113 N. Y. 575.)

In this case the witness may perhaps have been able to weaken the force of the damaging testimony and he was not prohibited from so doing by section 829 of the Code, unless the explanation sought involved a personal transaction or communication with the

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decedent. (*Lewis v. Merritt*, 98 N. Y. 206; *Merritt v. Campbell*, 79 id. 625; *Sanford v. Sanford*, 5 Lans. 486; *Markell v. Benson*, 55 How. Pr. 360; *Howe & Hummel v. Schweinberg*, 4 Misc. Rep. 73; 23 N. Y. Supp. 607.)

The fact that the counsel for the appellant did not indicate the character of his proposed explanation did not warrant the exclusion of this evidence. (*Hopler v. Hunter Arms Co.*, 64 App. Div. 80-83.)

That objection was not suggested either by court or counsel at the trial. The only criticism offered by the counsel for the plaintiff upon the trial was that the witness was incompetent under section 829 of the Code, and that was the only ground upon which its exclusion was based.

We cannot say the exclusion of this evidence was not harmful to the appellant. The court in his charge laid much stress upon this testimony of the appellant in the case of *Higham v. Kelley*, wherein he stated that he was not in copartnership with his father in the grocery business but worked for him. The court characterized these statements as "an important bit of evidence" and a "strong circumstance against his contention" upon this trial, and called attention to the fact that they were given under oath, commenting at considerable length upon the testimony and its importance. This testimony must, therefore, have had weight with the jury. While it may not occur to us just what satisfactory explanation could be made to deaden the sting of this important evidence, yet appellant ought to have been given that opportunity, within reasonable limits, and assuming that he violated no rule of evidence.

ADAMS, P. J., McLENNAN, WILLIAMS and HISCOCK, JJ., concurred.

Order reversed and new trial ordered, with costs to the appellant to abide event, upon questions of law only, the facts having been examined and no error found therein.



BARBARA SCHEIR, as Administratrix, etc., of JOSEPH SCHEIR,  
Deceased, Respondent, v. WILLIAM C. A. QUIRIN, Appellant.

*Negligence—employee of a tannery falling into a vat—risk incident to the business—an objection that a defense was not pleaded is not first available on appeal—proof of freedom from contributory negligence—declarations after the accident as res gestæ.*

In an action to recover damages resulting from the death of the plaintiff's intestate, it appeared that the defendant operated a tannery and that he maintained therein a series of cooling vats into which superheated tanning liquor was conveyed from time to time by means of a trough called a pump log; that the series of vats extended in a northerly and southerly direction and that the pump log was placed on top of the vats and a few inches from the westerly side thereof; that extending along the series of vats, a little east of the center thereof, was a staying timber used to bind the partitions of the vats together; that, for the purpose of providing the employee in charge of the vats with a platform upon which to stand while driving plugs into the bottom of the vats, a plank had been placed on top of the vats extending from the staying timber to the pump log.

It further appeared that on the day of the accident the intestate, who was an experienced employee of the defendant, was notified to take charge of one of the cooling vats which had been filled with the superheated tanning liquor, and that, in some undisclosed manner, he fell into the vat; that he ran into a boiler house about seventy feet away and called out to a co-employee, "Oh, George, I am scalded, the plank slipped off and throwed me in."

No one saw the accident and there was no direct proof showing precisely how it occurred. There was testimony, however, given by men who went to the place of the accident immediately after its occurrence, tending to show that the westerly end of the plank was in the vat; that the other end rested on the staying timber and that the liquid was spattered upon the plank, pump log and partition.

*Held*, that, assuming that there was sufficient evidence to show that the intestate was upon the plank when, in some manner, it fell into the liquor, carrying him along with it, the plaintiff was not entitled to recover;

That the risk of falling into the vat while standing upon the plank was an incident of the intestate's employment and was assumed by him;

That the objection that the defendant had not pleaded as a defense the assumption of the risk by the intestate could not be taken for the first time upon appeal;

That, in the absence of testimony, either direct or inferential, that the intestate had exercised the caution which the conditions demanded of him, it could not be said that the plaintiff had shown that the intestate was free from contributory negligence;

That the declaration made by the intestate to his co-employee after falling into the vat was competent as part of the *res gestæ*;

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That, in order to make such a declaration competent, it must bear a close relation to the principal transaction and must be a spontaneous exclamation or an outburst of feeling and not a mere narration of a past event.

APPEAL by the defendant, William C. A. Quirin, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Cattaraugus on the 20th day of June, 1902, upon the verdict of a jury for \$2,750, and also, as stated in the notice of appeal, from an order denying the defendant's motion for a new trial made upon the minutes.

The order denying the new trial does not appear in the record.

*Fred L. Eaton*, for the appellant.

*W. D. Parker*, for the respondent.

SPRING, J. :

The plaintiff's intestate, an employee of the defendant, on the 5th of January, 1901, fell into a vat of boiling liquid, receiving injuries which resulted in his death, and which are the basis of the present cause of action. The defendant owned and operated a tannery in the town of Olean, Cattaraugus county. Plaintiff's intestate had been in his employ for three years and was consequently familiar with the work in which he was engaged at the time he sustained the injuries complained of. A brief sketch of the construction of the defendant's plant and of the surroundings, so far as pertinent, may be useful to a better appreciation of the situation. The defendant's tannery is a large industry and the tan bark is ground up and water poured in upon it in large tanks. In a false bottom of each tank are steam pipes which heat the liquid to a very high temperature. There are a series of thirteen vats uniform in size and construction, abutting upon these large tanks. Each of these vats, which are called cooling vats, is eighteen feet long, about nine feet wide, and four and one-half feet in depth. They are separated by partitions made of two-inch planks, and the thirteen vats thus joined together extend in a northerly and southerly direction; but each individual vat is longest east and west. The hot liquid from the tanks is let into these vats through a trough made of two-inch planks called a pump log, the inside measurement of which is about eight inches each way. This log extends along close to the westerly side and on the top of these cooling vats, and the top of the pump

log is about flush with the top of the vats and a few inches from the westerly side. There are holes in the pump log through which the liquor runs into the several vats and which are plugged when not in use or when it is desired to stop the flow of the liquid. In the bottom of each vat are also logs or pipes through which the liquid when cooled is run off into other vats. Along the westerly or long side and about nine inches below the top of the vats was a walk separating them from the leeching vats. These cooling vats were covered by a shed or roof.

The injuries to the decedent were inflicted by his falling into vat No. 1, which is the southerly of this series of vats. There are three holes in the conduits in the bottom of tank No. 1 in which plugs are inserted when the vat is being filled with liquid. There is a long handle attached to these plugs reaching to the top of the vat so that it can be manipulated when the vat is filled. These vats are not all filled with the hot liquid at the same time, but the same pipes are used to empty all of the vats. When the liquor from one tank is permitted to run out, it is claimed it will sometimes loosen by pressure the plugs in the other tanks, and the employee who looks after them is then compelled to tighten them with a mallet. The holes at the bottom of tank No. 1 are situated close up to the partition between that vat and the one adjoining on the north. One is near the westerly side of the vat, the other about two feet easterly, and the remaining one still further along two feet. There is some dispute as to the manner in which these plugs are tightened. Evidence was produced on the part of the plaintiff from which it appears that a man in using the mallet would stand with one foot on the pump log and the other on the staves or planks which compose the partition between the two vats. It appears also that there is a stick of timber about eight by four inches extending along these vats which is used to bind or tie the partitions together so that they will not topple over. This staying timber is a little east of the center of these vats. The proof shows that a plank was placed from this tie timber to the upper pump log upon which the employee stood and drove down the easterly plug whenever it became loosened.

The theory of the complaint in this action is that the decedent was in the act of driving a plug in the upper pump log "for the

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purpose of shutting off the flow thereof into one of said vats" when he was precipitated into the vat. The action, however, was tried against the protest of the defendant upon the assumption that Scheir, the intestate, was upon the plank driving the plug into one of the lower conduits when the plank slipped into the vat, carrying him down with it.

We do not give to this variance the substantial effect assigned to it by the counsel for the appellant. In any event the charge is that the accident occurred by the slipping or the falling of the plank while the intestate was standing upon it driving or handling a plug. If the master was liable at all under the rule requiring him to furnish to this workman a suitable appliance to carry on the work it is not of especial significance just what particular act the employee was performing when the plank slipped if he was within the range of his employment.

On the day of the accident this vat No. 1 had been cleaned of sediment, and the superheated liquor was run into it, and Scheir was notified to take charge of it, which was his ordinary duty. The vat was about filled when in some manner, which does not appear, he fell into this hot liquor. He ran into a boiler house about seventy feet away and called out to a co-employee, "Oh, George, I am scalded, the plank slipped off and throwed me in." No one saw the accident and there is no direct proof showing precisely how it occurred. There was proof adduced by men who went to the place of the accident immediately upon its occurrence showing that the westerly end of the plank was in the vat, the other end resting on the tie beam, and that the liquid was spattered about upon the plank, pump log and partition. There may be sufficient, therefore, to show that the decedent was upon this plank when in some manner it fell into the liquor, carrying him along with it.

Assuming this to be so, we think it quite clear that the plaintiff was not entitled to recover. He was very familiar with the surroundings. He had used this plank very often. There is no pretense that it was not long enough to reach safely from the tie timber to the pump log. While standing over this hot liquid with the escaping steam is a dangerous employment, yet its hazard was an incident to the business and was as well known to Scheir as to the defendant. It required no scientific knowledge to see how the

plank was placed and that care and caution must be exercised to prevent an accident. It is one of the class of accidents which are frequent in dangerous employments about manufacturing establishments and which occur to the most experienced employee. In fact, the very familiarity of the intestate with this business may have lulled him into the security which is tantamount to carelessness.

The answer itself does not set forth the defense of assumption of risk by Scheir. (*Dowd v. N. Y., O. & W. Ry. Co.*, 170 N. Y. 459.) The facts, however, all came out upon the trial without any objection, and the question of this defect in the answer was not raised. Had it been, an opportunity would probably have been given to amend the answer upon such terms as would have been proper. We think it is too late upon this appeal to raise this objection. (*Kilkin v. N. Y. C. & H. R. R. Co.*, 76 App. Div. 529.)

Nor do we think the plaintiff has met the affirmative obligation imposed upon her of showing freedom from carelessness on the part of the intestate. Where death results from injuries and where there are no eye witnesses of the transaction there is a relaxation in the proof required, but the burden of establishing the absence of contributory negligence still remains unshaken. (*Pruey v. N. Y. C. & H. R. R. Co.*, 41 App. Div. 158; *affd.*, 166 N. Y. 616, and cases cited.) We are entirely in the dark as to the situation of the plank or what caused it to slip or fall. There is no pretense that it was broken or defective. If too close to the edge of the pump log, the decedent should have observed it. If it slipped because the tie timber and log were wet with steam, ordinary caution called upon him to appreciate that danger. He knew that in cold weather in this open shed, steam or vapor would rise from this hot liquor. The point is, it was for the plaintiff to show by direct testimony or as a fact fairly deducible from the surrounding and complementary facts that Scheir exercised the caution which the conditions demanded. We are left wholly to speculation or conjecture upon this aspect of the case, for the inferences do not enlighten us.

We think the declaration made by Scheir to the engineer in the engine room, stating that he was scalded and that the plank slipped throwing him in, was competent. This engine room was sixty or seventy feet from the vat, and Scheir ran there in intense pain and spontaneously cried out as stated. This was closely connected

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with the transaction and was the natural exclamation of a man in great agony and suffering and we think it may be said to be part of the *res gestæ*. It is very difficult to enunciate any principle from the authorities on this subject which will fit every case. In order to make a declaration of this kind competent it seems to be settled that it must bear a close relation to the principal transaction and that it must be a spontaneous exclamation, an outburst of the feelings, and not a mere narration of a past event. In *Waldede v. N. Y. C. & H. R. R. Co.* (95 N. Y. 274) there is an elaborate discussion of the authorities, and the declaration in that case was held to be incompetent, but it occurred some time after the transaction and was a narrative of how it occurred. There was nothing ejaculatory or involuntary in the statement, and we think the case is clearly distinguishable from the present one. In *Patterson v. Hochster* (38 App. Div. 398) the decedent was injured, as it was claimed, by falling in an open coal hole upon the defendant's premises. She turned to a person accompanying her and screamed out: "My God \* \* \* my leg is in the scuttle-hole and it is broke." It was held in that case that the testimony was competent as part of the *res gestæ*, but as there was no other evidence in support of the statement that the coal hole was insecurely covered a verdict could not be based wholly upon that declaration. In the present case there is considerable evidence tending to support the statement of Scheir that the plank slipped precipitating him into the hot liquor. While the question is not entirely free from doubt, we think the evidence was so closely connected with the occurrence that it was competent.

The judgment and order should be reversed and a new trial granted, with costs to the appellant to abide the event.

ADAMS, P. J., WILLIAMS, HISCOCK and DAVY, JJ., concurred.

Judgment and order reversed and new trial ordered, with costs to the appellant to abide event upon questions of law only, the facts having been examined and no error found therein.

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NOTE.—The rest of the cases of this term will be found in the next volume, 78 App. Div.—[REP.]



# DECISIONS

## IN

### CASES NOT REPORTED IN FULL.

#### FOURTH DEPARTMENT, NOVEMBER TERM, 1902.

**Betsey Stewart, Respondent, v. Clifford A. Dunn, Appellant.**—Judgment reversed and new trial ordered, with costs to the appellant to abide the event.—Appeal from a judgment of the Supreme Court, entered in the county clerk's office of Orleans county November 18, 1901, upon the decision of the court rendered after a trial at Special Term.

**WILLIAMS, J.:** The judgment should be reversed and a new trial granted, with costs to the appellant to abide event. The action was brought to set aside a deed to the appellant made by the respondent (her husband joining with her in the deed) on the ground of fraud in procuring the same, and for an accounting as to rents and profits. The respondent and her husband were old people, about eighty years of age. The appellant was a grandson. The deed was given in April, 1900, and conveyed a farm of some ninety acres in Gaines, Orleans county, subject to a mortgage thereon of \$1,100, which appellant agreed to pay. The deed contained clauses requiring the appellant to do all the work on the farm, and keep the buildings and fences in repair during the lifetime of the respondent and her husband, and to care for, support and maintain them, furnish clothing, medical attendance and nursing, suitable and proper in their station in life, and furnish them with horse, harness and buggy, and care for the same, etc., and providing that appellant should not sell or dispose of the property during the lifetime of respondent and her husband or the survivor of them, and would erect a monument on their cemetery lot, and finally stating the intention of the parties to be that the appellant should care for, maintain, clothe and support the respondent and her husband until their death as members of his family, in a manner fitting, suitable and proper for their station in life, and upon the death of the survivor the property should belong to the appellant. These provisions in the deed and that for the payment of the \$1,100 mortgage constituted the consideration for the transfer of the property. Respondent's husband is now dead. The allegations in the complaint were, in brief, that the giving of the deed was procured by false and fraudulent statements made by the appellant and his agent; that it was merely a contract relative to the working and management of the farm; that the respondent relied on and believed such statements when she executed the deed, and that it was not read by or to her and she did not know it was a deed of the property. There was a full examination upon the trial of the respondent and her husband, and the appellant and his so-called agent, Dibble, and of Dibble's wife (who was the mother of appellant, and the daughter of respondent and her husband), as to the negotiations back and forth resulting in the giving of the deed.

The trial court found there was no fraud practiced upon the respondent and her husband, but that they did not understand that a deed was being given, and it was given through inadvertence and mistake, and for that reason directed judgment setting it aside. The court very fairly states the main facts appearing from the evidence in the decision, viz.: "At the time of the execution and delivery of said deed of conveyance to the said defendant Clifford A. Dunn, and for many years prior thereto, the plaintiff had been the owner of said lands and premises. It had been the home of herself and husband for a long time, but on account of the age of her husband and herself the carrying on of this farm had become burdensome. They were both of about the age of eighty years at the time the deed was made; they both had great affection for the defendant, who was their grandson, and their confidence in him was implicit; he was not then, but is now, twenty-one years of age; he had before this time done work for the plaintiff upon this farm, and the relations of the plaintiff and her husband with him had always been pleasant. Desiring to be relieved from the carrying on this farm, they conceived the plan of having the defendant Dunn carry on the farm, leaving their home intact, and with the ultimate purpose and design of leaving the farm to him after their death. They consulted with their said grandson, the defendant Dunn, and also with his mother, their daughter, as well as her husband, Marshall J. Dibble. The plaintiff and her husband seem to have been more anxious to have the arrangement consummated than either the grandson, his mother, or her husband, but finally the plan was assented to, the deed of conveyance was made and executed by the plaintiff and her husband and delivered to the defendant, Clifford A. Dunn, who thereupon took possession thereof, carried on said farm, had the proceeds thereof, paid the taxes thereon. The needs of the plaintiff and her husband by way of support and maintenance have been very small, and they have not hesitated to restrict themselves even as regards necessities, whenever they felt it would be burdensome to the grandson, the defendant Dunn." The court then proceeds to state the particular ground of the decision, viz.: "While there was no fraud or imposition practiced by Dunn or her mother or (her) husband, yet the infirmity of the plaintiff and her husband was such, on account of their advanced age, that they did not understand the full effect of the conveyance with its conditions contained therein. Neither \* \* \* understood that the plaintiff was making and executing a deed of conveyance which should take effect immediately, and as soon as they discovered the effect of the transaction and the effect\* that

\* Sic.



an absolute conveyance had been made, both the plaintiff and her husband repudiated the transaction, and said deed of conveyance was made through inadvertence and mistake." A reading of the evidence leads us to the conclusion that the finding by the court that the plaintiff and her husband did not understand the effect of the deed and its conditions, and made the deed through misapprehension or mistake, was against the weight of evidence. The scheme was theirs, was thoroughly talked over and considered, a lawyer was consulted and made a draft of the conditions which was submitted to the plaintiff and her husband, and it is not now suggested by the court that they were misled or deceived as to the contents of the deed which they executed, or that the negotiations were not fair and honestly conducted. They seemed to be quite intelligent, and to give their evidence readily and clearly, and it is very apparent to us that they did understand what they were doing when they made the deed. More than this, the action as brought was based upon fraud. Fraud was not established. The only other ground for the relief granted was mutual mistake, and it is not pretended that there was any mistake or misapprehension on the part of the defendant Dunn. Mistake or misapprehension on the part of the plaintiff would not constitute mutual mistake, and would not authorize the court to set aside the deed unless such mistake or misapprehension was the result of some acts or omissions on the part of the defendant amounting to fraud. Either the defendant must have made statements inducing the mistake or misapprehension, or else with knowledge that such mistake or misapprehension existed, the defendant must have kept still and permitted the plaintiff to execute the deed under such mistake or misapprehension, in either of which cases the defendant would be guilty of fraud and the relief would be afforded on the ground of fraud and not of mutual mistake. The agreement contained in the deed was deliberately made between the parties, the defendant entered upon the performance of his part thereof and continued in his performance for some time. One of the old people is now dead, the other is more than eighty years of age. No real reason appears in the case why the defendant should now be deprived of his interest under the contract. The decision of the trial court seems to us to be an injustice to the defendant, and to be unauthorized in view of the facts appearing in the record. The judgment should, therefore, be reversed and a new trial granted, with costs to the appellant to abide event. McLennan, Spring, Hiscock and Davy, JJ., concurred.

Charles E. Merrell, as Trustee of Burdick & Welch, Bankrupt, Appellant, v. Adelbert S. Welch, Respondent.—Judgment of County Court and of Justice's Court reversed, with costs in this and the County Court.—Appeal from a judgment of the County Court of Livingston County.—

DAVY, J.: (Memorandum) Held, that it appears from the concessions made by the defendant and the evidence taken upon the trial, that the plaintiff was trustee of Burdick & Welch; that they were adjudged bankrupt, and that the defendant had appropriated to his own use the sum of fifty-one dollars which belonged to the said bankrupt firm. The justice, therefore, erred in granting the nonsuit, for which error the judgment of the County Court and that of the Justice's Court must be reversed, with costs in this court and

the County Court. Adams, P. J., Spring-Williams and Hiscock, JJ., concurred.

John S. Gunsaul, Respondent, v. Charles W. Grannis and William P. O'Connor, Appellants.—Judgment and order affirmed, with costs. All concurred, except Hiscock, J., dissenting, on the ground that the verdict is contrary to the evidence.

Christopher P. Clark, Appellant, v. Frank H. Cross, Respondent.—Judgment and order affirmed, with costs. All concurred.

Duty Hopkins, Appellant, v. William Van Nostrand, Respondent.—Judgment affirmed, with costs. All concurred.

Nancy J. Rockwell, Respondent, v. The Village of Solvay, Appellant.—Judgment and order affirmed, with costs. All concurred, except Williams, J., dissenting.

Rudolph Klinger, an Infant, by Adolph Klinger, his Guardian ad Litem, Plaintiff, v. The Eastern Lumber Company, Defendant.—Plaintiff's exceptions overruled, motion for new trial denied, and judgment ordered for the defendant, with costs. All concurred.

John Murphy, Respondent, v. Edward Cuff, Appellant.—Judgment and order affirmed, with costs. All concurred, except McLennan and Williams, JJ., dissenting.

George Doheny and Another, as, etc., Respondents, v. Stewart Worden, Salt Springs National Bank of Syracuse, Appellant, v. Leonard Worden, Appellant.—Order reversed, with ten dollars costs and disbursements, and motion denied, with ten dollars costs, upon the opinion of Williams, J., on the former argument. All concurred, except Hiscock, J., not voting.

Ralph L. Van Derveer, Respondent, v. Ezra G. Smith and James Hovey, Appellants.—Judgment of County Court affirmed, with costs. All concurred.

Byron H. Daggett, Appellant, v. Thomas Stoddard and Charles Stoddard, Copartners under the Firm Name and Style of Stoddard Bros., Respondents.—Judgment and order affirmed, with costs. All concurred.

William F. Lansing, Appellant, v. Richard Evans, Respondent, Impleaded with James H. Cross.—Judgment and order affirmed, with costs. All concurred. Hiscock, J., not sitting.

Erastus Teschout, Respondent, v. The City of Rome, Appellant.—Judgment and order affirmed, with costs. All concurred.

William Soper, Respondent, v. Charles J. Wam, Appellant.—Judgment of County Court affirmed, with costs. All concurred.

Helen Mae Nichols, Respondent, v. The Phoenix Insurance Company of Hartford, Connecticut, Appellant.—Judgment and order affirmed, with costs. All concurred.

William J. Hart, Respondent, v. William B. Kirk, Appellant.—Judgment of County Court affirmed, with costs. All concurred.

Cornelia Dean Curtis, Respondent, v. Orville Dean, Appellant.—Judgment of County Court affirmed, with costs. All concurred.

The John Brown Company, Appellant, v. Daniel Bonacker, Respondent.—Judgment of County Court affirmed, with costs. All concurred.

The Drake Hardware Company, Respondent, v. The Wrought Iron Range Company, Appellant.—Order appealed from modified in accordance with memorandum filed with the clerk, and as so modified affirmed, with costs. All concurred.

John B. Mussy, as Receiver, etc., of George W. Copley, Respondent, v. Ernestus Gulick and Chaumont Company, Appellants, Impleaded with Others.—Judgment affirmed, with costs. All concurred, except McLennan and Hiscock, JJ., dissenting, on the ground that

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the testimony of George Copley in supplementary proceedings was improperly received in evidence.

Harold Ferguson, an Infant, etc., Respondent, v. Buffalo Traction Company, Appellant.—Motion for reargument denied, with ten dollars costs. Motion for leave to appeal to the Court of Appeals denied.

Michael C. Tomney, Respondent, v. American Telephone and Telegraph Company, Appellant.—Motion for leave to appeal to the Court of Appeals denied, with ten dollars costs.

Pierce, Butler & Pierce Manufacturing Company, Respondents, v. Bauer-Hamilton Plumbing Company and Others, Appellants.—Motion for leave to appeal to the Court of Appeals denied, with ten dollars costs.

In the Matter of the Disbarment of Samuel H. Manson, an Attorney.—Referee's report confirmed and respondent removed and disbarred from practice.

In the Matter of the Disbarment of Gabriel W. Wisner, an Attorney.—Referee's report confirmed and respondent removed and disbarred from practice.

In the Matter of the Disbarment of George F. Quinn, an Attorney.—Referee's report confirmed and respondent removed and disbarred from practice.

In the Matter of the Disbarment of Robert H. Slocum, an Attorney.—Referee's report confirmed and respondent removed and disbarred from practice.

In the Matter of the Application for the Appointment of a Committee of Eugene P. Clark, an Incompetent Person, Appellant; Howland P. Welle, Petitioner, Respondent.—Orders appealed from affirmed, with ten dollars costs and disbursements. Adams, P. J., McLennan, Spring, Williams and Hiseock, J.J., concurred.

George Palmer, Appellant, v. John Harrer, Respondent, Impleaded with William White. (Action No. 1.)—Judgment and order affirmed, with costs. Adams, P. J., McLennan, Spring, Williams and Hiseock, J.J., concurred.

George Palmer, Appellant, v. John Harrer, Respondent, Impleaded with William White. (Action No. 2.)—Judgment and order af-

firmed, with costs. Adams, P. J., McLennan, Spring, Williams and Hiseock, J.J., concurred.

Chauncey C. Woodworth, as, etc., Appellant, v. Brynne Hardin, Impleaded, etc., Respondent.—Order reversed, with ten dollars costs and disbursements, and motion denied, with ten dollars costs, without prejudice to right of respondent to renew the motion made at Special Term. Held, that under the order of the county judge upon which apparently without other notice the motion resulting in the order appealed from was made, the only question presented was whether the judgment in question had been paid, and that the fact of such payment was not sufficiently established to warrant the order vacating the supplementary proceedings. Adams, P. J., McLennan, Spring, Williams and Hiseock, J.J., concurred.

James L. Voorhees and Sidney Cook, Respondents, v. Charles R. Main and Alexander C. Martin, Appellants.—Judgment and order of County Court affirmed, with costs. Adams, P. J., Spring, Williams, Hiseock and Davy, J.J., concurred.

The Leibhardt Commission Company, Plaintiff, v. William C. Dunham and George H. Harris, Defendants.—Defendants' exceptions overruled, motion for new trial denied and judgment ordered for the plaintiff upon the verdict, with costs. Adams, P. J., Spring, Williams, Hiseock and Davy, J.J., concurred.

In the Matter of the Application of John J. Stewart for a Writ of Mandamus against Francis G. Ward, as Commissioner of Public Works, etc.—Order affirmed, with ten dollars costs and disbursements. Adams, P. J., McLennan, Spring, Williams and Davy, J.J., concurred.

The United States of America for the Use and Benefit of, etc., Respondent, v. Joseph J. Churchyard, and Others, Appellants.—Judgment affirmed, with costs. Adams, P. J., McLennan, Spring, Williams and Davy, J.J., concurred.

Ell M. Upton and Another, Plaintiffs, v. Scottish Union and National Insurance Company, Defendant.—Defendant's exceptions overruled, motion for new trial denied, with costs, and judgment ordered for the plaintiff upon the verdict, with costs. All concurred.

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John Aird Dempsey, Respondent, v. Joseph M. Gassam, Appellant, Impleaded with Bergen County Traction Company and Others, Defendants.—Order reversed, with ten dollars costs and disbursements, and motion granted, with ten dollars costs.—Appeal from an order denying a motion for a bill of particulars.—

**PEN CURIAM:** The motion of the defendant Gassam for a bill of particulars of the plaintiff's claim should have been granted, and the order denying that motion must be reversed. In this same action (*Dempsey v. Bergen County Traction Company*, 74 App. Div. 474) we held that the defendant corporations were entitled to a bill of particulars, and reversed an order denying the motion made by them for such a bill. The defendant Gassam is entitled to the information he demanded in his notice of motion. In denying that motion, the court below suggested that it could be passed upon better after the return of a commission which the plaintiff had moved for and that possibly some of the evidence to be elicited would render it unnecessary to state some part of the particulars demanded. The right of the defendant to a bill of particulars is not af-

fected by the return of a commission, as was held in *Dempsey v. Bergen County Traction Company* (*supra*). The order appealed from should be reversed, with ten dollars costs and disbursements, and the motion for a bill of particulars granted as demanded by the moving party, with ten dollars costs. Present—Van Brunt, P. J., Patterson, O'Brien, McLaughlin and Laughlin, J.J.

William P. Knowles, a Taxpayer of the City of New York, Appellant, v. Bernard F. Conklin and Others, Respondents.—Order affirmed, with ten dollars costs and disbursements.—Appeal from an order denying the plaintiff's motion for an injunction.—

**PEN CURIAM:** The plaintiff appeals from an order denying a motion for an injunction pending suit in an action which he has brought as a taxpayer against the defendant Conklin, who is filling the position and discharging the duties of a sergeant of police of the city of New York, the police commissioner of the city of New York, several defendants constituting the municipal civil service commission of the city of New York, and the comptroller of that city. The object of the action is to restrain the police commissioner and the municipal civil service commission

from certifying, and the comptroller from paying to the defendant Conklin, full salary as a police sergeant. The defendant Conklin claimed that, under the provisions of chapter 780 of the Laws of 1901,\* he, being then a telegraph operator, was entitled to the rank of sergeant of police and an appointment to that position. He made an application to the Supreme Court for a writ of mandamus directing the police commissioner to recognise him as such sergeant of police, with the privileges pertaining to that office. A peremptory mandamus was issued granting the relief Conklin prayed for, and he is ostensibly entitled to the rank and pay of the office. The contention of the plaintiff now is that chapter 780 of the Laws of 1901 is unconstitutional in that it contravenes the provisions of section 2 of article 10 of the Constitution of the State of New York, and is violative of the civil service requirements for the appointment or promotion to the office of sergeant of police. It has been sought on the appeal from this order to have this court pass upon several very important questions, namely, those relating to the constitutionality of chapter 780 of the Laws of 1901, the effect of the final judgment unappealed from in the mandamus proceeding, upon the plaintiff's right to maintain this action, his right to maintain it at all as a taxpayer, and whether an action other than in the nature of a quo warranto will lie. It is evident upon a perusal of this record that these questions should not be disposed of upon affidavits presented upon a motion for an injunction *pendente lite*, especially in a case where the public interest is gravely concerned. The facts, the establishment of which would be necessary to a proper determination of the action, may be made to appear quite differently on the trial from their statement in these affidavits; and before determining the important questions here involved, we think all the facts should be definitely ascertained, and nothing left to mere inferences or conjectures. We do not now intend to express an opinion on any of the questions involved in this action, but merely to hold that we will not at the present time interfere with the discretion exercised by the court below in refusing the injunction at this stage of the case. The order appealed from should be affirmed, with ten dollars costs and disbursements. Present—Van Brunt, P. J., Patterson, Ingraham, Hatch and Laughlin, JJ.

**W. Stebbins Smith, Respondent, v. Martin Schwarzer, Appellant.**—Order affirmed, with ten dollars costs and disbursements.—Appeal from an order continuing an injunction.

**PER CURIAM:** We think the learned judge at Special Term correctly held that this case in principle is controlled by *Stuyvesant v. Early* (58 App. Div. 442). In view of the fact that the injunction in some form must be continued until the trial, nothing would be gained by a determination now as to the extent, if any, to which the order as entered should be modified. The injunction order is extensive in terms, but the question of whether or not the plaintiff is entitled to such extensive relief can better be determined upon the trial when after the presentation of all the facts the court will be enabled to formulate by judgment the exact relief to which the plaintiff is entitled. The order appealed from is accordingly affirmed, with ten dollars costs and disbursements. Present—Van Brunt, P. J., O'Brien, Ingraham, McLaughlin and Hatch, JJ.

**George H. Kratt, Appellant, v. Franklin W. Hopkins and Allison R. Hopkins, Respond-**

**ents.**—Judgment affirmed, with costs.—Appeal from a judgment dismissing the complaint at the close of plaintiff's case. The action was brought to recover a balance alleged to be due the plaintiff from the defendants, who are stock brokers, after the sale by them of plaintiff's stocks. The complaint avers that by an account stated on April 30, 1901, the defendants held for plaintiff certain shares of stock on which there was a balance in his favor of \$4,735.92; that in the month of May all three stocks were sold, leaving in defendants' hands a surplus of \$3,318.40 which has not been paid; that on or about May 13, 1901, the defendants reported to plaintiff an alleged purchase and sale of 300 shares of Chesapeake and Ohio railroad stock, as the result whereof losses occurred greater than plaintiff's balance; that "no authority was ever given by this plaintiff \* \* \* for the purchase or sale of the aforesaid \* \* \* 300 shares \* \* \* and plaintiff, upon notice of the purchase thereof duly and at the first opportunity repudiated the same." The answer admitted the account stated and the other allegations, excepting that plaintiff gave no authority to buy and sell the 300 shares, and averred that such authority was given and that the plaintiff ratified the transaction. The plaintiff testified that he was not speculating in stock with the defendants and that they introduced him to a Mr. Fronick who had a desk in their office and that he signed on February 13, 1901, the following paper: "Gentlemen: You are hereby authorized to execute Mr. Louis Fronick's orders to buy and sell stocks not exceeding 300 shares for my account until further notice;" that he was traveling most of the time, and on May 3, 1901, wrote the defendants inclosing a statement received from them and dated May 3, 1901, saying: "We have this day bought for your account and risk; per order of L. Fronick, 300 shares C. & O. price 52." In this letter he said: "Kindly let me know if the enclosed statement is O. K. Do you hold \* \* \* C. & O. or is this a mistake and ought to be sold for 'do'." Thereafter, he testified, he received telegrams that this stock was sold and that other stocks were sold and money was needed and answered: "My reply is to do the best you can for me; and let me know what, if anything, is saved from the wreck." On the same day he sent telegram: "Cannot send check; do best you can for me;" and another telegram: "Take no more orders from Fronick on my account." On his cross-examination he was asked, "But this 300 shares was purchased on or about—before the 3d or 4th day of May, before the panic. You had received notice from Mr. Fronick that he was acting for you and you had accepted it?" and answered: "I did. I came back to New York after the panic. \* \* \* I asked them what they proposed to do about the 300 shares of Chesapeake and Ohio that I returned to them." The court denied the motion to go to the jury on the question of agency and granted the motion to dismiss the complaint at the close of plaintiff's case, and from the judgment so entered, the plaintiff appeals.—O'BRIEN, J.: Upon the question of agency, we think the court could not do otherwise than dismiss the complaint. The plaintiff's own evidence shows that he signed the paper giving authority to Mr. Fronick to make such a purchase and sale of 300 shares and he admits that he received the statement of the purchase and replied asking more particularly regarding it but not expressly disaffirming it and thereafter,

\* Amdg. Laws of 1897, chap. 378, § 276. as amd. by Laws of 1901, chap. 462.—[RE.]

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upon notice of sale, merely instructed the defendants to do the best they could for him. His own testimony thus shows clearly that he did give the necessary authority. The more serious question presented upon this appeal is whether or not, at the close of the plaintiff's case, the burden rested upon the defendants of proving the purchase and sale of the 300 shares of Chesapeake and Ohio stock in dispute between the parties. This we think, may be disposed of by a consideration of the issues as presented by the pleadings. It was of course competent for the plaintiff to have framed his complaint so as to recover as upon an account stated by setting forth merely the statement rendered him, showing a balance in his favor, and this would have thrown upon the defendants the burden of pleading as an affirmative defense in their answer and of proving upon the trial that they had purchased and sold by direction or by authority of the plaintiff the 300 shares, the loss upon which wiped out the balance appearing in plaintiff's favor in the account stated. The plaintiff, however, did not think proper to adopt this form of complaint, but, after setting forth the account rendered by the defendant showing such balance, proceeded, as we construe the complaint, by admitting in effect the purchase and sale of the 300 shares of stock, and then alleging that the same were purchased and sold without his authority, and that when notified of the transaction of the purchase and sale he repudiated it, placing his repudiation expressly on the ground that the purchase and sale were without authority. The defendants by their answer proceeded to meet the issue thus tendered by expressly denying the allegations of the complaint that the transactions were without plaintiff's authority, and by affirmatively alleging "that the plaintiff by and through his agent did give them authority to purchase and sell the 300 shares of stock of the Chesapeake and Ohio Railroad Company mentioned in the third paragraph of the complaint." Upon the trial no contention arose upon the claim that the defendants had or had not bought and sold the 300 shares, it being assumed throughout that they had, the evidence of the plaintiff being directed to showing, as alleged in the complaint, that "no authority was ever given by this plaintiff to defendants for the purchase or sale." In construing the pleadings, therefore, as to the issue tendered, we are confirmed in our view, first, that by the language employed it was not intended by the plaintiff to assert that the defendants had not bought and sold the 300 shares of stock, but merely that such transaction or transactions were without any authority from him. And we are further confirmed in this construction of the pleadings by the one which the parties themselves gave, as shown by their conduct at the trial and the manner in which the testimony was adduced, the plaintiff being content to rest his case, after admitting the receipt of the notice of the purchase and sale of the disputed shares of stock, upon his denial that Pronick, through whom the sales were ordered, had authority from him. We do not think, therefore, that the learned judge committed any error in refusing to submit the question of whether the 300 shares of stock were actually purchased and sold, because no such question was raised by the pleadings, and in no way did the plaintiff intimate during the trial or upon his motion to go to the jury that there was any such question in the case. It appearing conclusively by plaintiff's own evidence that he had constituted Pronick his agent to give orders to purchase

and sell stocks to the extent of the 300 shares, there was no other course open for the trial judge than to dismiss the complaint. Upon such dismissal the plaintiff asked "leave to go to the jury upon the case as already presented and particularly upon the question of agency of Pronick for defendant." It has been suggested upon this appeal that in this blind way plaintiff sought to raise the question as to the actual purchase and sale of stock by defendant, and that because of the attitude thus assumed he placed upon the defendants the burden of showing, before they were entitled to a dismissal, the necessity of proving that they had really purchased and sold the stock. To this we do not assent, having, as we think, shown that the plaintiff never intended either by his complaint or upon the trial, to raise any such question. In effect he conceded that the transaction of the purchase and sale had occurred and he restricted and limited the issue to an assault upon the authority under which the defendants claimed to act. The suggestion, therefore, that it was error to dismiss the complaint until the defendants had shown that they had actually bought and sold the shares of stock in dispute, is clearly an afterthought; and the question, had it been raised upon the trial or intimated to the court, could, without any injustice to the plaintiff and without the necessity of a new trial, have been disposed of. Thinking as we do that the motion to dismiss was properly granted, it follows that the judgment appealed from should be affirmed, with costs. Van Brunt, P. J., Ingraham, McLaughlin and Hatch, JJ., concurred.

Henry C. Valentine, Appellant, v. Warren M. Healey and John H. Zabriskie, Respondents. — Judgment reversed, new trial granted, costs to appellant to abide event. — Appeal from a judgment entered upon the direction of the court dismissing the complaint after a trial at Trial Term. —

O'BRIEN, J.: There are three facts that did not appear at the former trial, but were established upon the new trial which, in our opinion, distinguish the case and make inapplicable the rule stated as controlling on the previous appeal. (*Valentine v. Healey*, 1 App. Div. 502; 188 N. Y. 369.) The first is, the evidence now shows that Valentine joined in the original lease with Healey. The second is, that notice in writing was sent by Valentine to Healey, objecting to the firm's holding over or retaining the property unless it was taken for a year. The third fact, now clearly brought out, is that Healey did not undertake as a tenant in common to reinvest himself with possession, but that a different entity or firm, known as Healey & Co., tenants under the old lease, held over and retained possession of the premises. The judgment appealed from should be reversed and a new trial granted, with costs to the appellant to abide the event. Patterson and Laughlin, JJ., concurred; Van Brunt, P. J., and McLaughlin, J., dissented.

Jennie T. B. Becker, as Executrix, etc., of James Brady, Deceased, Respondent, v. The City of New York, Appellant. — Judgment and order affirmed, with costs. — Appeal from a judgment entered upon the verdict of a jury and from an order denying a motion for a new trial. —

O'BRIEN, J.: The action was brought to recover under a contract which plaintiff's assignor made with the city of New York on November 13, 1899, for the regulating and grading of Claremont avenue; and the principal claims are for excavation and filling re-

quired through error on the part of the engineer, for fees wrongfully deducted as overtime charges, and for work wrongfully excluded by the city from the engineer's certificate. We do not feel called upon to enter into any extended statement of the facts or argument, as these fully appear from the former opinion of this court (58 App. Div. 801), and the opinion of the Court of Appeals (170 N. Y. 319). The legal questions presented have been determined by the Court of Appeals, and the new trial has been had upon the lines laid down in the opinion of that court. The main question in dispute arose by reason of the error in setting the stakes for the center line of the avenue and the error in fixing the grades. There being evidence that the stakes had been placed by the city before the contractor commenced work, and that he had made objection and had been directed to proceed in accordance with the center line thus fixed, the Court of Appeals held that it was competent for the jury upon finding such facts to allow the plaintiff to recover notwithstanding the provision in the contract which made the engineer the agent of the contractor. With respect to the grades, it was left open by the Court of Appeals as to whether there could be recovery; but it was intimated that upon the former trial there was no sufficient evidence that the contractor had, after objection, proceeded with his work in accordance with such grades under compulsion or by direction of the city authorities. That question, therefore, remained to be determined upon the new trial. As the result of such trial, however, it now appears that there was no real difference between the attitude of the contractor with respect to the grades and his attitude respecting the center line furnished by the engineer, the jury by their verdict having found that the contractor had called attention to what he claimed was an error in the grades and, notwithstanding such objection, was ordered and directed to proceed with his work in a way determined by the engineer. In this connection it will be noticed that the letter sent by Mr. Dean, the superintendent, when the contractor pointed out the error in the center line, directed him to proceed "in accordance with the *grade lines* and stakes as given" by the engineer in charge of the work. Upon the subject of overtime the verdict of the jury is controlling in holding the city responsible for the delays and for the additional work which resulted from the errors of the engineer, and as a consequence refusing to allow any deduction for overtime. Looking into the extent and character of the additional work occasioned by the errors and the additional days thereby required to complete the contract, a calculation shows that the time expended by the contractor was not excessive. So too, with regard to the claim for rock excavation wrongfully excluded from the engineer's certificate; the testimony of the engineer's assistant as to the rock which was actually removed by the contractor supports the jury's finding. The appellant's final point is that the court erred in charging the jury that plaintiff was entitled to interest upon an unliquidated part of the claim. An examination of the charge to the jury shows that they were permitted to add interest upon the three items making up the first cause of action, namely, on \$335 retained by the defendant as security and concededly belonging to plaintiff, \$3,044 wrongfully deducted as overtime charges, and \$4,666.80, the contract

price for 7,736 cubic yards of rock excavation at eighty-five cents a yard, wrongfully excluded from the certificate by the engineer. Upon the items of the second cause of action of \$8,580 for 2,180 cubic yards of rock excavated, because of the error of the engineer, at a fair compensation of \$4 per cubic yard, \$952 for 2,180 cubic yards of filling required for the same reason and fairly worth 40 cents per cubic yard, and \$362 for 88 cubic yards of rock excavation owing to error in the center line, reasonably worth \$4 per cubic yard, no interest was permitted nor actually given by the jury. On the first cause of action the award was \$10,584.42, which is the sum of the three items mentioned with interest, and on the second cause of action \$9,734, the exact sum of the items named without interest. The defendant's contention, therefore, that the court erroneously allowed the jury to award interest upon the claim for rock excavation which was unliquidated is without merit, for the claim for rock excavated under the contract, but wrongfully excluded from the engineer's certificate, was as much a liquidated claim as was the charge for overtime. No interest was allowed on the rock excavated by reason of the error of the engineer in fixing the lines and grades. Had there been, the appellant's argument would apply. Our conclusion, therefore, is that the judgment and order appealed from should be affirmed, with costs. McLaughlin and Hatch, JJ., concurred; Van Brunt, P. J., and Ingraham, J., dissented.

*The People of the State of New York ex rel. Thomas F. Rice, Appellant, v. Thomas Sturgis, Commissioner of the Fire Department of the City of New York, Respondent.*—Order affirmed, with costs.—Appeal from an order denying a motion for a peremptory writ of mandamus reinstating the relator as a fireman in the fire department of the city of New York.

INGRAHAM, J.: The relator alleged in his petition upon which this application was made that he had been duly appointed a member of the uniformed force of the fire department, and that on or about the 7th day of March, 1902, he was removed from said position and his name was dropped from the rolls of the department by the direction of the respondent, although no written charges had been preferred against him and no opportunity afforded him to be heard in his defense upon any charges, as required by law. In answer to this petition an affidavit of the commissioner was submitted which stated that "The relator herein was absent without leave from 8:55 a. m., March 1, 1902, to 8 o'clock a. m., March 8, 1902. That said absence was never explained by the petitioner to deponent. At the end of the five days unexplained absence without leave deponent deemed and held that by such unexplained absence the petitioner intended to resign, and deponent thereupon accepted it as such and dropped the petitioner's name from the pay roll." By section 736 of the revised charter it is provided: "No member of the fire department shall, under penalty of forfeiting the salary or pay which may be due to him, withdraw or resign, except by permission of the fire commissioner. Unexplained absence without leave, of any member of the uniformed force for five days, shall be deemed and held to be a resignation by such member and accepted as such." Upon this application we must accept the statement of the respondent as true, and under this provision of the charter we think that the respondent

was authorized to treat the unexplained absence of the relator as a resignation and accept it as such. The relator thus being in the position of a member of the uniformed force who had resigned and whose resignation had been accepted by the commissioner, was not entitled to mandamus requiring his reinstatement. (*People ex rel. Fuhv v. York*, 49 App. Div. 178; *affd.*, 168 N. Y. 551; *People ex rel. Brennan v. Sturges* (ante p. 151). It follows that the order appealed from must be affirmed, with costs. Van Brunt, P. J., Patterson, Hatch and Laughlin, JJ., concurred.

**Joseph Weibler, Respondent, v. Ida C. Cook and Grace M. Olmstead, Appellants.**— Judgment and order reversed, new trial ordered, costs to appellant to abide event.—Appeal from judgment entered upon verdict, and from order denying motion for a new trial.—**FRANZMAN, J.**: This action was brought to recover commissions from the defendants. The plaintiff was a real estate broker and the defendants were the owners of certain lots on the corner of One Hundred and Seventeenth street and Morningside terrace, in the city of New York. The plaintiff negotiated for the sale of the lots and finally procured a Mr. Ryan, who offered to purchase them. In answer to a request from the defendants he called upon Mr. Ridgway, their attorney, who gave to the plaintiff the following:

"NEW YORK, Dec. 18th, 1901.

"This is to certify that Joseph Weibler is our agent to procure a purchaser for the lots in the northwest corner of 117th street and Morningside Terrace, and in case of a sale at figures satisfactory to us to a person capable of carrying out his contract, we agree to pay him a commission of one per cent.

"IDA C. COOK,

"GRACE M. OLMSTEAD,

"By C. D. RIDGWAY,

"Atty."

The next day he took Ryan to Mr. Ridgway's office and there met the defendants. Ryan then offered \$72,500 for the lots, which was the price that the defendants were willing to accept. After some discussion about the terms of the contract, Ryan asked the plaintiff whether there were any restrictions on the lots. There was then some discussion about whether or not there were restrictions, but a contract was prepared, signed by the defendants and retained by Mr. Ridgway, and an unsigned copy was given to Ryan to procure the signature of the person for whom he was acting. The plaintiff then asked for his commissions, when one of the defendants said that they would send him a check. He subsequently asked Mr. Ridgway for the commissions, when he was told that the transaction had not gone through. It also appeared that there was a covenant affecting these lots which prevented the front ten feet from being built upon, and the purchaser refused to purchase subject to this restriction, but subsequently offered to take the lots at a reduction of ten per cent, which the defendants refused. When the plaintiff told Mr. Ridgway that he could get an offer of \$72,500, Mr. Ridgway said he thought that the defendants would accept it, and on the thirteenth day of December, when the contract was prepared, the defendants expressed themselves as willing to accept an offer of \$72,500 for the property. They never, however, authorized the plaintiff to procure a purchaser at that price, nor was there ever an acceptance of this sum of \$72,500 for the property that the defendants

could sell, which was the property subject to this restriction. The sale was never consummated because the prospective purchaser refused to give the sum of \$72,500, which was the price that would have been satisfactory to the defendants for the property which they had to sell. There was no statement to the plaintiff that the property was free from incumbrances or restrictions; and the agreement of the defendants was that they would pay to the plaintiff a commission of one per cent in case of a sale at figures satisfactory to the defendants to a person capable of carrying out his contract. The testimony was uncontradicted that no purchaser was procured by the plaintiff upon terms satisfactory to the defendants, and no contract was executed, no sale actually made. At the end of the plaintiff's case the defendants moved to dismiss the complaint, which was denied. There was evidence on behalf of the defendants that the only offer to sell the property made by them was for \$72,500, subject to any restriction that there was upon the property, and that the purchaser procured by plaintiff refused to pay the same. At the end of the case the defendants' counsel again moved to dismiss the complaint and direct a verdict for the defendants, which was denied; and the plaintiff's counsel then moved for a direction of a verdict in favor of the plaintiff, which was granted and a verdict directed for the plaintiff for the full amount claimed, to which the defendants excepted. I think this was clearly error, as the plaintiff never found a purchaser "at figures satisfactory to" the defendants, viz., \$72,500, subject to the restrictions. It follows that the judgment and order appealed from must be reversed and a new trial ordered, with costs to the appellant to abide the event. Van Brunt, P. J., O'Brien, McLaughlin and Hatch, JJ., concurred.

**Thomas J. McCabe, Respondent, v. The City of New York, Appellant.**— Judgment reversed, new trial ordered, costs to appellant to abide event.—Appeal from a judgment entered upon the verdict of a jury by direction of the court.—

**HATCH, J.**: In its general features this case is brought within the decision in *Benjamin v. City of New York* (ante, p. 62), where the judgment was reversed. The principles of law therein enunciated are controlling of the rights of the plaintiff in the present action. In addition to this, it is disclosed by the present record, without dispute, that by rule 27 of the building department, to which the plaintiff was subject, it is required that all employees of such department shall perform such other duties not therein specially prescribed for them as the interest of the departmental service may demand or require in the opinion of the superintendent of buildings; and by rule 6 it is required that all notices of violations of law and others, as may be necessary, shall be served by the messenger or any employee of the department in a careful, exact and proper manner, and the proper returns of such service shall be made immediately thereafter. It was testified by the chief clerk of the department of buildings, and not disputed, that in connection with these rules, he gave to the employees instructions that the affidavits required in the department to be taken were so to be taken as a part of the duty of the respective employees. It must have been understood, therefore, by the plaintiff and the other employees that what they did in connection with the matter, for which they now seek to recover, was a

part of the duty which devolved upon them to perform in connection with their employment; and under such circumstances no additional charge beyond the salary received by him, or them, could be properly made therefor. The case is essentially different from *Mertzbach v. Mayor* (188 N. Y. 16), as therein the services were recognized to be independent of the official employment, and the charges were made under the direction of the head of the office. He was authorized to incur such charge, and an appropriation had been made for payment of such expenses. No such facts appear in this case. The court was, therefore, not authorized to direct a verdict, and the judgment based thereon should be reversed and a new trial granted, with costs to the appellant to abide the event. Patterson, Ingraham and Laughlin, J.J., concurred. VAX BRUNT, P. J. (concurring): I concur with Mr. Justice Hatch in his opinion in this case. I am also of opinion that the plaintiff, being an employee of the city, could make no charge for work done even for the city in office hours. I think that another reason why there can be no recovery in this case is that there is no evidence whatever that any person in the building department could incur any such obligation on the part of the city. Patterson, Ingraham, Hatch and Laughlin, J.J., concurred.

Thomas J. O'Neill, Respondent v. Leroy B. Crane, as Surviving Partner of the Firm of Leroy B. Crane and Royal S. Crane, Appellant.—Judgment and order reversed, new trial ordered, costs to appellant to abide event.—Appeal from a judgment entered upon the verdict of a jury, and from an order denying the defendant's motion for a new trial made upon the minutes.—HATCH, J.: This is an action brought by an attorney to recover on a *quantum meruit* for professional services claimed to have been rendered by him to a partnership, which was claimed to exist between the defendant Leroy B. Crane and Royal S. Crane. The latter having died, this action is continued against the defendant Leroy B. Crane as surviving partner. The case has been before this court upon a former appeal, where the judgment was reversed and a new trial granted for error committed in the reception of evidence. (*O'Neill v. Crane*, 85 App. Div. 358.) The evidence in the present record is in all substantial respects the same as was given on the former trial. It is not necessary that it be adverted to in detail. The plaintiff seeks a recovery, based upon the existence of a copartnership between Leroy B. Crane and Royal S. Crane at the time when the services for which a recovery is sought were rendered. That such partnership existed is an express averment of the complaint, is reiterated in the bill of particulars and was the theory upon which the trial was had. Neither the pleadings nor the evidence given in the case support any other theory upon which a recovery can be based. At the close of the trial the court laid down for the guidance of the jury, and as issues to be determined by them, three propositions: First, were the surviving defendant and his brother copartners, engaged in the practice of their profession at the time when the services were rendered; second, did these defendants, as partners, employ the plaintiff to do certain legal business; and third, what it was worth? These were the questions litigated upon the trial and there was a sharp conflict in the testimony concerning each one. The existence of the partnership was proved, if established at all, by purely circumstantial evidence, and while the court in

the opinion delivered upon the former appeal stated that the evidence upon such subject was sufficient to carry the case to the jury, yet it is evident that the testimony upon which to found a partnership, assuming the correct rule was then stated, is by no means conclusive; but, on the contrary, it is meagre and in many respects inconclusive. Upon this subject, therefore, it became essential that the rights of the defendant should be carefully guarded and protected. At the request of the plaintiff, the court charged the jury "that it is not necessary for the plaintiff, in order to succeed, to prove that there was a general partnership between the defendants." To this charge the defendant took an exception. It is disclosed by the record that up to the time when this request was made nothing had occurred which showed, or tended to show, that any of the parties understood that a recovery could be had, based upon any other theory than the establishment of a general copartnership. The evidence given by the plaintiff would not support a recovery upon any other theory. The court itself in the body of its charge had laid down the rule that such fact must be established as an essential part of the plaintiff's cause of action. The charge, therefore, in this particular was not only inconsistent with the complaint and the bill of particulars and the proof given upon the trial, but it was also inconsistent with the main charge as delivered by the court to the jury. In no view, therefore, can this charge be sustained, as it authorized a recovery based upon no evidence, and was inconsistent with every rule, both of law and of evidence, which the parties and the court had regarded as necessary to sustain a recovery prior thereto. This charge was neither modified nor cured by anything which followed, and the case, therefore, was finally left to the jury to find a verdict upon a theory which neither the pleadings nor the evidence warranted or supported. For this error the judgment and order should be reversed and a new trial granted, with costs to the appellant to abide the event. Van Brunt, P. J., O'Brien, Ingraham and McLaughlin, J.J., concurred.

William G. Barson and Charles H. Barson, Respondents, v. Agnes K. Murphy Mulligan and William G. Mulligan, Appellants.—Order affirmed, with ten dollars costs and disbursements, and order to be entered as directed in opinion.—Appeal from an order denying a motion to amend a judgment.—McLAUGHLIN, J.: This action was in ejectment. At the conclusion of the trial the court held that there was nothing for the jury except the amount of damages to which the plaintiffs were entitled for the use and occupation, and directed a verdict upon all of the other issues involved. That he directed a verdict upon such other issues is apparent not only from the first sentence in the charge to the jury, in which he said: "Gentlemen of the Jury, the important questions in this case were disposed of, so far as this trial is concerned, by the direction of the court. Whether they are correct or not will be, perhaps, hereafter finally settled, and that leaves for you, in the consideration of this case, merely the question of what damages the plaintiffs are entitled to for the use and occupation of these two plots of land from the second day of October, 1897," and the exception by defendants' counsel, to wit, "I will take an exception to that part of your Honor's charge in which you instruct the jury that the only question for them to determine is the amount of damages which the plaintiffs are entitled to,"

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but also from the order made by the trial court at the conclusion of the trial, which recited the finding made by the jury. The jury awarded plaintiffs certain damages, which were doubled under the statute,\* and judgment was thereafter entered, adjudging that the plaintiffs were entitled to recover such damages, and that they were the owners in fee and entitled to the immediate possession of the premises described in the complaint. Subsequently the defendants moved to correct the judgment by striking therefrom the award to the plaintiffs of the possession of the premises, and directing that the judgment be made to conform to the verdict rendered. This was denied and the defendants appealed. It is perfectly apparent that all of the questions involved in the case were disposed of by the trial court, except the one of damages. This the counsel on both sides understood, and the clerk, when the jury rendered a verdict for the plaintiffs for damages, should have included therein a recovery by plaintiffs by direction upon all of the other issues involved. Indeed, the trial judge, without going through the form of a verdict, could have directed such entry to be made, and this he, in effect, did when he stated to the jury that he had disposed of all of the questions except the one of damages, which was the only question submitted to them. The court at Special Term could have directed the clerk to make such entry in his minutes. The order appealed from, therefore, must be affirmed, with ten dollars costs and disbursements, and an order entered directing the clerk to make an entry in his minutes in conformity with the views here expressed. Van Brunt, P. J., O'Brien, Ingraham and Hatch, JJ., concurred.

**Charles L. Zimmerman, Respondent, v. Emil B. Meyrowitz, Appellant.** (Action No. 2).—Order and judgment reversed, with costs and disbursements to appellant.—Appeal from a judgment entered upon an order of the court, adjudging part of the defendant's amended answer to be sham and awarding judgment to the plaintiff upon the remainder of the amended answer for the relief demanded in the complaint, with costs. Also from the order striking out the defense contained in the answer, and directing judgment for the plaintiff.—

**HATCH, J.:** The question arising upon this appeal is precisely the same as that disposed of in the case of *Zimmerman v. Meyrowitz*, being action No. 3 of the series (*ante*, p. 329). The order and judgment based thereon should be reversed, with costs and disbursements to the appellant. Van Brunt, P. J., Patterson, Ingraham and Laughlin, JJ., concurred.

**The People of the State of New York, Respondent, v. Abraham Feldman, Appellant.**—Judgment reversed and new trial ordered.—Appeal by defendant from a judgment of conviction of the crime of rape in the second degree. The indictment was for the crime of rape in the second degree and abduction. The abduction count was withdrawn when the prosecution rested. The charge is that about seven o'clock on Sunday morning, June 16, 1901, the defendant perpetrated an act of sexual intercourse with one Pauline Kenner, a girl under eighteen years of age, who was not his wife, under circumstances not amounting to rape in the first degree. The defendant, a young man twenty-one years of age, had been in the business of making coats and jackets with his father at 374 Canal street, New

York city, for three years. They occupied a loft consisting of two rooms divided by a partition, on the third floor of No. 374, and the complainant was employed by them there. She testifies that she had worked in this shop but three days before the sixteenth, reporting for duty every morning at eight o'clock, but was directed on Friday by the defendant to come to the shop on Sunday morning at seven o'clock, as they closed on Saturday; that he had never taken any liberties with her or made any advances to her prior to her coming to work on Sunday morning; that when she arrived that morning about seven o'clock she found the defendant and another employee there; that the defendant came to where she was working and placed one hand on her shoulder; "then I said to him that my sister-in-law told me to beg him to let me go home. It was a lie, it was not true, but I told him only because he used to come near me;" that he then gave her a jacket on which to sew five buttons, after finishing which and after telling him, on account of his being disinclined to let her go owing to the pressure of business, that she desired to go to Newark to attend a wedding, she started down stairs on her way home; that he followed and "caught" her on the second floor; that she broke away from him, but that he "caught" her again on the first floor and "held me fast," "laid" her down on the floor and had connection with her, despite her cries and resistance; that this took place on a wooden floor, with the front door of the place half-way open, and occupied about five or six minutes, during all of which she screamed and hollered, but no one came to her assistance; that when he let her up she went to her home, and from there started for Newark at about nine o'clock that morning with her whole family, and did not return until night, the trip being for pleasure only and there being no wedding; that she did not mention this occurrence with the defendant until twelve o'clock that night, when she told her sister, who thereupon told her mother. The sister testified that she called at the defendant's place of business with the complainant the following morning. Her version of the conversation with the defendant is as follows: "I asked him what was the matter that he had with my sister. He said, 'Don't talk so loud and keep quiet; I will settle with you.' Q. Just repeat over again what you asked him? A. When I came in I asked for his father. Then he said that father is not here. Then he asked me what I want. Then my sister came up, and I asked him the question what he had with her. He said, 'I made a mistake. Come on, we will settle. How much do you want.'" This is the only corroboration in the case tending to connect the defendant with the commission of the crime. A female physician was called by the People and testified to an examination made shortly after the above interview on Monday at nine o'clock, at which she found evidences of rupture by some blunt instrument, and that "the penetration appeared to be a recent one. The parts were very raw, and the surface of the vagina was bleeding and raw, as though it had been very recent;" that the child was in an exceedingly nervous and fainting condition when in her office, and was brought there by a Mrs. Solomon. Opposed to this is the testimony of the defendant, who denies his guilt and the conversation testified to by the complainant's sister; the testimony of two men, who say they were in the defendant's shop on this Sunday, waiting for

\* Laws of 1896, chap. 547, § 200.—[Rep.]



their employer to open up his place of business in the loft across the hall, and a man employed by defendant and his father, the three of whom claim that defendant stayed in the shop some time after the girl left and that they heard no cries, and the testimony of a man who occupied a room separated from the alleged scene of the assault only by a defective wall, through which he claims that the noise of a struggle or screams would certainly have been transmitted, and that he heard nothing of the kind. The man employed by defendant stated that there was another operator in the shop that morning besides those named, but this man was not called to testify. The complainant stated that there was one operator in the room when she came, but she also answered "no" to the question, "Did anybody else come there to that shop on that Sunday besides this defendant and yourself?" The defendant's previous good character was established by the testimony of four citizens, three of whom were business men and one "a reverend and a Hebrew teacher," who had known him intimately. The foregoing is the only material evidence in the case.

LAUREN, J.: We are of opinion that this evidence raises a reasonable doubt as to the guilt of the defendant, that the verdict is against the weight of the evidence and that justice requires that he should have a new trial. (Code Crim. Proc. § 897.) Counsel for the respondent, apparently appreciating that the testimony of the complaining witness as to the circumstances under which she claims that the assault took place is overborne by the other testimony in the case, seeks to sustain the conviction upon the theory that it is probable that there was no very violent assault upon her and not much resistance upon her part. Her testimony as to the place of the assault and the circumstances under which it took place, with her screaming and resisting to the extent of her ability, is certainly very improbable. In view of the preponderating evidence that the defendant did not leave his place of business until after she had had ample time to pass out of the building, we think it will not do to speculate and accept as truthful that part of her testimony which shows the assault, and reject entirely her evidence concerning her resistance and outcry. Moreover, the nature of the testimony of the female physician is such as to indicate that the conditions she found were produced more recently than the preceding morning. This complainant's whereabouts from the time of the alleged assault should have been more satisfactorily accounted for, as well as her connection with Mrs. Solomon. It does not appear who Mrs. Solomon is, nor how or why she accompanied the complainant. The testimony of the sister, if true, does not necessarily sustain the evidence of the complaining witness. It would indicate that the defendant was guilty of some impropriety, but not necessarily that he was guilty of this serious crime. In view of the previous good character of the defendant, which is not questioned and is sustained by reputable witnesses, and of the other evidence in his behalf which we regard as preponderating, we think it will not do to allow the conviction in this case to stand. The judgment should, therefore, be reversed and a new trial ordered. Van Brunt, P. J., and Patterson, J., concurred; Ingraham and Hatch, JJ., dissented.

INGRAHAM, J. (dissenting): I think that in this case there was a fair question for the jury; that the case was fairly submitted to the jury by a charge which correctly presented the questions to be determined; that

the rights of the defendant were in all respects protected, and that we are not justified in reversing the judgment. The testimony of the complainant was amply corroborated, and if the admission of the defendant, testified to by the complainant's sister, was believed, the jury was justified in finding that the defendant committed the assault upon the complainant. The testimony of the complainant as to the resistance that she made, while probably exaggerated, does not justify us in disregarding her testimony. Her recollection of what occurred at the time such an assault was made upon her would probably be considerably confused, and I think that she might in entire good faith exaggerate the resistance that she made. The character of the witnesses called by the defendant, the nature of their testimony and their relation to the defendant's father made their credibility a question for the jury. The relation that exists between an employer of young girls and such employees is such that it gives him great influence over them, and I think that their protection requires that this law should be strictly administered. I think, therefore, that the judgment should be affirmed. Hatch, J., concurred.

The City of New York, Respondent, v. Forty-second Street and Grand Street Ferry Railroad Company and Others, Appellants. — Judgment, so far as it overrules the joint demurrer of the defendants, and the separate demurrers of the Forty-second Street and Grand Street Ferry Railroad Company and the Metropolitan Crows-town Railway Company, reversed and the demurrers sustained, with costs in this court and in the court below; and so far as it overrules the separate demurrer of the Metropolitan Street Railway Company, affirmed, with costs, with leave to the Metropolitan Street Railway Company to answer on payment of costs in this court and in the court below. — Appeal from an interlocutory judgment overruling demurrers to the complaint, with leave to the defendants to serve an answer within twenty days.

INGRAHAM, J.: This action is brought to recover license fees for cars used by the defendant, the Metropolitan Street Railroad Company, in the operation of a street railroad. The complaint, after alleging the incorporation of the plaintiff and of the defendants, alleges that the defendant Forty-second Street and Grand Street Ferry Railroad Company on or about February 21, 1893, became the assignee of one John T. Conover and others of the rights, privileges and franchises conferred upon them by virtue of chapter 515 of the Laws of 1890; that in and by said act it was provided among other things that said Conover and others and their assigns should pay to the city the same license fee annually for each car run upon the lines of said railroad as was then paid by the other city railroads in said city; that by an ordinance duly approved December 3, 1893, the common council of said the mayor, aldermen and commonality of the city of New York, being thereto duly authorized, did ordain as follows: "Each and every passenger railroad car running in the City of New York below 125th Street shall pay into the city treasury the sum of fifty dollars annually for a license;" that on or about May 18, 1893, the defendant Forty-second Street and Grand Street Ferry Railroad Company leased to the defendant Metropolitan Crows-town Railway Company its lines of railroad and appurtenances, passenger cars and other property, and that on or about May 28, 1894, the

defendant Metropolitan Crosstown Railroad Company was consolidated into and with the Metropolitan Street Railway Company, and has ever since operated and maintained and been in the control of the lines of railroad of said defendant Forty-second Street and Grand Street Ferry Railroad Company and the passenger cars run thereon; that during the years 1896 to 1899, inclusive, there were used, run and operated upon the lines of the railroad of the defendant Forty-second Street and Grand Street Ferry Railroad Company, below One Hundred and Twenty-fifth street in the city of New York, passenger cars for which there became due and the defendants became liable to pay to the plaintiff car license fees of which there remained due to the plaintiff the sum of \$1,000 with interest thereon. The defendants jointly demurred to this complaint upon the ground that several causes of action were improperly united, and each defendant separately demurred upon the same ground and also upon the ground that the complaint does not state facts sufficient to constitute a cause of action against it. For the reasons stated in the case of *City of New York v. Sixth Ave. R. R. Co.* (ante, p. 367) we think that the judgment appealed from, so far as it overrules the joint demurrer of the defendants, and the separate demurrers of the Forty-second Street and Grand Street Ferry Railroad Company and the Metropolitan Crosstown Railroad Company, should be reversed and the demurrers sustained, with costs in this court and in the court below; and that the judgment, so far as it overrules the separate demurrer of the Metropolitan Street Railway Company, should be affirmed, with costs, with leave to the Metropolitan Street Railway Company to answer on payment of costs in this court and in the court below. Van Brunt, P. J., Patterson, Hatch and Laughlin, J.J., concurred.

The City of New York, Respondent, v. Central Park, North and East River Railroad Company and Others, Appellants.—Judgment, so far as it overrules the joint demurrer of the defendants and the separate demurrers of the Central Park, North and East River Railroad Company and the Metropolitan Crosstown Railway Company reversed, and the demurrers sustained, with costs in this court and in the court below, and so far as it overrules the separate demurrer of the Metropolitan Street Railway Company affirmed, with costs, with leave to the Metropolitan Street Railway Company to answer on payment of costs in this court and in the court below.—Appeal from an interlocutory judgment overruling demurrers to the complaint, with leave to the defendants to serve an answer within twenty days.—

INGRAHAM, J.: The same question is presented in this case as is presented in *City of New York v. Sixth Ave. R. R. Co.* (ante, p. 367), and for the reasons there stated we think that the judgment appealed from, so far as it overrules the joint demurrer of the defendants, and the separate demurrers of the Central Park, North and East River Railroad Company and the Metropolitan Crosstown Railway Company should be reversed and the demurrers sustained, with costs in this court and in the court below; and that the judgment, so far as it overrules the separate demurrer of the Metropolitan Street Railway Company, should be affirmed, with costs, with leave to the Metropolitan Street Railway Company to answer on payment of costs in this court and in the court below. Van Brunt, P. J., Patterson, Hatch and Laughlin, J.J., concurred.

The City of New York, Respondent, v. Broad-

way and Seventh Avenue Railroad Company and Others, Appellants.—Judgment, so far as it overrules the joint demurrer of the defendants and the separate demurrers of the Broadway and Seventh Avenue Railroad Company and the Houston, West Street and Pavonia Ferry Railroad Company, reversed and the demurrers sustained, with costs in this court and in the court below; and so far as it overrules the separate demurrer of the Metropolitan Street Railway Company affirmed, with costs, with leave to the Metropolitan Street Railway Company to answer on payment of costs in this court and in the court below.—Appeal from an interlocutory judgment overruling demurrers to the complaint, with leave to the defendants to serve an answer within twenty days.—

INGRAHAM, J.: The same question is presented in this case as is presented in the case of *City of New York v. Sixth Ave. R. R. Co.* (ante, p. 367), and for the reasons there stated we think that the judgment appealed from, so far as it overrules the joint demurrer of the defendants, and the separate demurrers of the Broadway and Seventh Avenue Railroad Company and the Houston, West Street and Pavonia Ferry Railroad Company, should be reversed and the demurrers sustained, with costs in this court and in the court below; and that the judgment, so far as it overrules the separate demurrer of the Metropolitan Street Railway Company, should be affirmed, with costs, with leave to the Metropolitan Street Railway Company to answer on payment of costs in this court and in the court below. Van Brunt, P. J., Patterson, Hatch and Laughlin, J.J., concurred.

The City of New York, Respondent, v. Eighth Avenue Railroad Company and Metropolitan Street Railway Company, Appellants.—Judgment, so far as it overrules the joint demurrer of the defendants and the separate demurrer of the Eighth Avenue Railroad Company, reversed and demurrers sustained, with costs in this court and in the court below, and so far as it overrules the separate demurrer of the Metropolitan Street Railway Company affirmed, with costs, with leave to the Metropolitan Street Railway Company to answer on payment of costs in this court and in the court below.—Appeal from an interlocutory judgment overruling demurrers to the complaint, with leave to the defendants to serve an answer within twenty days.—

INGRAHAM, J.: The questions presented in this case are the same as those presented in the case of *City of New York v. Sixth Ave. R. R. Co.* (ante, p. 367), except that in this case the defendant, the Eighth Avenue Railroad Company, by an instrument in writing dated November 28, 1895, leased to the defendant, the Metropolitan Street Railway Company, its lines of railroad constructed and operated by it in the city of New York pursuant to its charter and grant by the mayor, aldermen and commonalty of the city of New York and the acts of the Legislature, and that the defendant Metropolitan Street Railway Company has ever since operated and maintained the same and the passenger cars thereon. For the reasons stated in the opinion in that case we think that the judgment appealed from, so far as it overrules the joint demurrer of the defendants, and the separate demurrer of the Eighth Avenue Railroad Company, should be reversed and the demurrers sustained, with costs in this court and in the court below, and that the judgment, so far as it overrules the separate demurrer of the Metropolitan

- Street Railway Company, should be affirmed, with costs, with leave to the Metropolitan Street Railway Company to answer on payment of costs in this court and in the court below. Van Brunt, P. J., Patterson, Hatch and Laughlin, J.J., concurred.
- The City of New York, Respondent, v. Ninth Avenue Railroad Company and Others, Appellants.—Judgment, so far as it overrules the joint demurrer of the defendants and the separate demurrers of the Ninth Avenue Railroad Company and the Houston, West Street and Pavonia Ferry Railroad Company, reversed, and the demurrers sustained, with costs in this court and in the court below, and so far as it overrules the separate demurrer of the Metropolitan Street Railway Company affirmed, with costs, with leave to the Metropolitan Street Railway Company to answer on payment of costs in this court and in the court below.—Appeal from an interlocutory judgment overruling demurrers to the complaint, with leave to the defendants to serve an answer within twenty days.—
- INGRAM, J.: The questions presented in this case are the same as those presented in the case of *City of New York v. Sixth Ave. R. R. Co.* (ante, p. 367), and for the reasons stated in the opinion in that case we think that the judgment appealed from, so far as it overrules the joint demurrer of the defendants and the separate demurrers of the Ninth Avenue Railroad Company and the Houston, West Street and Pavonia Ferry Railroad Company should be reversed, and the demurrers sustained, with costs in this court and in the court below, and that the judgment, so far as it overrules the separate demurrer of the Metropolitan Street Railway Company, should be affirmed, with costs, with leave to the Metropolitan Street Railway Company to answer on payment of costs in this court and in the court below. Van Brunt, P. J., Patterson, Hatch and Laughlin, J.J., concurred.
- The People of the State of New York, Appellant, v. Robert L. Martin and Harry Velt-husen, Respondents.—Order and judgment reversed and defendants directed to plead over.—Appeal from an order entered in the office of the clerk of General Sessions of the Peace in and for the county of New York on the 9th day of June, 1902, allowing a demurrer filed by the above-named defendants to the indictment found against the said defendants, charging them with the crime of perjury.—
- HATCH, J.: The question arising upon this appeal is the same as that disposed of in the case of *People v. Martin* (ante, p. 366). The order and judgment based thereon should, therefore, be reversed, and the defendants directed to plead over. Van Brunt, P. J., Patterson, Ingraham and Laughlin, J.J., concurred.
- Hans K. Frost, Plaintiff, v. Theresa Reinach, Appellant; Sigmund Feuchtwanger, Respondent.—Order affirmed, with ten dollars costs and disbursements. No opinion.
- Kate Klinder, as Administratrix, etc., of William Klinder, Deceased, Appellant, v. The New York Breweries Company, Respondent.—Judgment affirmed, with costs. No opinion.
- Alfred L. Brown, as Trustee in Bankruptcy of William Mutch, Appellant, v. Antoine Guichard, Respondent.—Judgment affirmed, with costs. No opinion.
- John H. Nash, Respondent, v. The New Jersey Steamboat Company, Appellant.—Upon plaintiff stipulating to reduce judgment as entered to the sum of \$3,353.14, judgment as so reduced affirmed, without costs to either party; in case such stipulation be not given, judgment reversed, new trial ordered, costs to appellant to abide event. No opinion.
- Margaret Lyons, as Administratrix, etc., of Thomas Lyons, Deceased, Respondent, v. Deennon-McLean Contracting Company, Appellant.—Judgment and order affirmed, with costs. No opinion.
- The United Press, Respondent, v. The A. S. Abell Company, Proprietor of "The Sun" Newspaper, and Others, Defendants; Felix Agnus, Appellant.—Order affirmed, with ten dollars costs and disbursements. No opinion.
- Clarence B. Smith, as Trustee in Bankruptcy of James W. Young, Respondent, v. James W. Young, Defendant, and William S. Young, Appellant.—Order affirmed, with ten dollars costs and disbursements. No opinion.
- Archibald A. Hutchinson and Victor K. McElheny, Jr., on Behalf of Themselves and All Other Stockholders of the American Maltng Company Similarly Situated, Respondents, v. John W. Simpson and Thomas Thacher, as Executors, etc., of John G. Moore, Deceased, and Others, Appellants.—Order affirmed, with ten dollars costs and disbursements. No opinion.
- Herbert A. Scheffel, Respondent, v. Virginia Hot Springs Company, Appellant.—Order affirmed, with ten dollars costs and disbursements. No opinion.
- Lydia D. Mason, as Executrix, Appellant, v. Metropolitan Street Railway Company, Respondent.—Judgment and order affirmed, with costs. No opinion.
- George Morgan, Appellant, v. The City of New York, Respondent.—Judgment and order affirmed, with costs. No opinion.
- In the Matter of The People of the State of New York ex rel. John P. Barrett, Relator, v. J. Hampden Dougherty, Commissioner of Water Supply, Gas and Electricity in the City of New York, Respondent.—Proceedings affirmed and writ dismissed, with fifty dollars costs and disbursements. No opinion.
- The People of the State of New York ex rel. Edward J. McGaffney, Relator, v. J. Hampden Dougherty, Commissioner of Water Supply, Gas and Electricity in the City of New York, Respondent.—Proceedings affirmed and writ dismissed, with fifty dollars costs and disbursements. No opinion.
- Thomas Conville Brewing Company, Respondent, v. John Caulfield, Appellant.—Judgment and order affirmed, with costs. No opinion.
- Charles Ward Hall, Appellant, v. James C. McGuire, Respondent.—Judgment affirmed, with costs. No opinion.
- Fishel Shapiro, as Administratrix, Appellant, v. Bernard Birnbaum, Respondent.—Judgment affirmed, with costs. No opinion.
- Thomas Mills & Brother, Appellant, v. Hartog & Beinhauer Candy Company, Respondent.—Judgment and order affirmed, with costs. No opinion.
- Marie Ackermann, Appellant, v. Viola Ackermann, Substituted in the Place of the Mutual Life Insurance Company of New York, Respondent.—Judgment affirmed, with costs. No opinion. (Patterson and Laughlin, J.J., dissenting.)
- John Boardman, Jr., Appellant, v. Catharine M. Yuengling, Respondent.—Judgment and order affirmed, with costs. No opinion.
- Giuseppe Mastrobuono, Respondent, v. Andrea Acconcia, Appellant, Impleaded with Central Brewing Company.—Order affirmed, with ten dollars costs and disbursements. No opinion.
- Agnes Neuhaus, Respondent, v. George E. Neuhaus, Appellant.—Order affirmed, with

- ten dollars costs and disbursements. No opinion.
- The People of the State of New York, Respondent, v. Edward G. Glennon, Appellant.—Order affirmed. No opinion.
- Central Trust Company of New York, as Trustee, Appellant, v. West India Improvement Company and Others, Respondents.—Order affirmed, with ten dollars costs and disbursements. No opinion.
- Salomon Marx, Appellant, v. Foote Commercial Phosphate Company and Others, Impleaded with Maggie Lewis, Respondent.—Order affirmed, with ten dollars costs and disbursements. No opinion.
- The People of the State of New York v. American Loan and Trust Company.—Motion denied.
- Adolph Solomon v. Metropolitan Street Railway Company.—Motion denied on payment of ten dollars costs; and on payment of an additional ten dollars, leave given to apply to court below to open default.
- William Williams and Another v. D. Willis James and Others.—Motion granted, with ten dollars costs.
- Silas E. Moorhead v. David Webster.—Motion dismissed, with ten dollars costs.
- Benjamin Orne v. William C. Greene.—Motion denied.
- In the Matter of Harlem River Bridge.—Motion granted.
- The People of the State of New York v. Max Liebowitz.—Appeal dismissed.
- Emile Brunin and Another v. Theodore de Wolmont.—Motion granted, with ten dollars costs.
- Pietro Pizzuto v. New York, Lake Erie and Western Railroad Company.—Motion granted, with ten dollars costs.
- Christine H. Hinsdale, as Executrix, etc., of Edward C. Hinsdale, Deceased, Respondent, v. New York, New Haven and Hartford Railroad Company, Defendant, Impleaded with New York Central and Hudson River Railroad Company, Appellant.—Reargument ordered.
- J. Condit Smith and William F. Judson, Respondents, v. Charles C. Converse, Defendant, Rosalie Abreu, Appellant.—Order affirmed, with ten dollars costs and disbursements. No opinion.
- The People of the State of New York ex rel. Joseph Gorman, Respondent, v. John E. Van De Carr, Warden of the City Prison, Appellant.—Order reversed, proceedings dismissed, and relator remanded on authority of *People ex rel. Abrams v. Fox* (ante, p. 245.)
- William Shipman v. William H. Bell.—Motion denied.
- Martin King v. Elizabeth A. Demarest.—Motion denied on payment of ten dollars costs; and on payment of an additional ten dollars, leave given to apply to the court below to open default.
- In the Matter of Alma L. Lerner.—Motion denied, with ten dollars costs.
- Preservaine Manufacturing Company v. Albert H. Seiling.—Motion dismissed, with ten dollars costs.
- Donald Mitchell v. John F. Williams.—Motion dismissed. See memorandum.
- H. Koehler & Company v. James W. Brady.—Motion dismissed. See memorandum.
- The People of the State of New York ex rel. Hugh Dolan v. Perez M. Stewart, Superintendent.—Motion denied.
- Lillian C. Morrison v. Ormond C. Smith and Another.—Motion dismissed, with ten dollars costs.
- George Steinson v. Board of Education.—Motion dismissed, with ten dollars costs.
- The People of the State of New York v. Harry Boesche.—Motion granted.
- The People of the State of New York ex rel. Philip F. Smith v. William R. Wilcox.—Motion granted, with ten dollars costs.
- Merritt H. Smith v. William A. Bryan.—Motion granted, with ten dollars costs.
- F. H. Schule Manufacturing Company v. Friederich H. Schule.—Motion granted, with ten dollars costs.
- Patrick J. Kennedy v. George C. Flint Company.—Motion granted, with ten dollars costs.
- Patrick F. Sheedy, Appellant, v. C. Frederick Kohl, Respondent.—Judgment affirmed, with costs. No opinion.
- William P. Knowles, Respondent, v. Pennsylvania Steel Company, Appellant, Impleaded with The City of New York and Others.—Judgment reversed, with costs, and demurrer sustained, with costs, and final judgment directed dismissing complaint, with costs, on the authority of *Meyers v. Pennsylvania Steel Co.* (ante p. 307.)
- In the Matter of the Appraisal under the Act in Relation to Taxable Transfers of Property of the Estate of Emily M. Lord, Deceased, Franklin B. Lord, Appellant; Comptroller of the State of New York, Respondent.—Order affirmed, with ten dollars costs and disbursements. No opinion.
- Carolina Stiasny, as Committee of Albert E. Stiasny, a Lunatic, Respondent, v. Metropolitan Street Railway Company, Appellant.—Order affirmed, with ten dollars costs and disbursements. No opinion. Van Brunt, P. J., dissenting.
- Morris Cohen, Appellant, v. Sanford H. Steele, as Executor, etc., of Jacob Cohen, Deceased, Respondent.—Order affirmed, with ten dollars costs and disbursements. No opinion.
- Lewis A. Cohen, Appellant, v. Sanford H. Steele, as Executor, etc., of Jacob Cohen, Deceased, Respondent.—Order affirmed, with ten dollars costs and disbursements. No opinion.
- Silas E. Moorhead, Appellant, v. American Surety Company of New York, Respondent.—Order affirmed, with ten dollars costs and disbursements. No opinion.
- Silas E. Moorhead, Appellant, v. American Surety Company of New York, Respondent.—Order modified by striking out the provision requiring the plaintiff to pay to the defendant ten dollars costs of the motion, and as thus modified affirmed, without costs. No opinion.
- Martin Kane and Another v. Nathan Kutkoff, Impleaded, etc.—Motion denied on payment of ten dollars costs; and on payment of an additional ten dollars, leave given to apply to the court below to open default.
- The People of the State of New York v. Charles S. Keller.—Motion granted.
- The People of the State of New York v. Jerome Rosenfeld.—Motion granted.
- Andrew Cohen v. Andrew B. Yetter.—Motion granted so far as to dismiss appeal, with ten dollars costs of motion.
- Enrico Invernizzi v. Thomas J. Dunn.—Motion granted, with ten dollars costs.
- John Lamb v. Marie True and Others.—Motion granted, with ten dollars costs.
- Rapid Safety Fire Extinguisher Company of New York, Respondent, v. Hay-Budden Manufacturing Company, Appellant.—Determination affirmed, with costs on opinion of Appellate Term. (Reported in 37 Misc. Rep. 558.) Van Brunt, P. J., and Laughlin, J., dissenting.
- J. Newton Watkins, Respondent, v. Matilda Wetterer, Appellant.—Motion denied, with ten dollars costs. Opinions per curiam and by O'Brien, J., dissenting. Opinions not furnished to reporter.

**M. H. Treadwell & Company** (Sheriff of New York County), Respondent v. **J. A. Mead Manufacturing Company**, Appellant.—Mo-

tion denied, without costs. Opinion per curiam. Opinion not furnished to reporter.

## SECOND DEPARTMENT, DECEMBER TERM, 1902.

**John H. Hendrickson**, Respondent, v. **Anthony S. Woods**, Appellant.—Judgment of the Municipal Court affirmed, with costs.—Appeal by the defendant from a judgment of the Municipal Court of the city of New York, in the first district of the borough of Queens, entered on the 18th day of March, 1902, upon a decision awarding the plaintiff \$300.00 damages and costs in an action to recover the value of his services as a stenographer.—

**WILLARD BARTLETT, J.**: This is an action to recover the reasonable value of services rendered by the plaintiff to the defendant in the capacity of a stenographer, in reporting the defendant's trial as a captain of police before the police commissioners of Long Island City. The defendant admits that certain services were rendered, but denies that they were of the value alleged in the complaint, and pleads payment for such services as are thus admitted. Upon the trial the proof was conflicting, but the evidence fairly established the plaintiff's claim. The only point presented by this appeal as to which there can be any serious doubt is the objection to the plaintiff's charge of five dollars for each day's attendance at the defendant's trial before the police commissioners of Long Island City when the proceeding was adjourned. There was no evidence of any express agreement to pay the stenographer for such adjournments, nor would evidence of a custom to make such a charge be binding upon the defendant, in the absence of circumstances indicating that he was aware of such custom and assented to it. The proof on this subject, however, went further, and was to the effect that five dollars for adjournments was the reasonable value of the services of the stenographer in attending upon the hearing, even though he was not called upon to take any testimony; and as the attendance on each occasion was at the instance and for the benefit of the defendant, he was chargeable with the reasonable value thereof thus established. No sufficient ground appears for interfering with the judgment, and it should be affirmed. All concurred.

**Christina Johnson**, Appellant, v. **John J. Manning**, as President, etc., Respondent.—Motion denied upon the ground that we are of opinion that the attorney, if he paid the money over to his client in good faith and did not collect it originally under circumstances which render him liable, may obtain the relief in the contempt proceedings now pending which he seeks upon this motion.

**William Schaus**, Respondent, v. **David Hutchison**, Appellant.—Order reversed, with ten dollars costs and disbursements, and motion granted changing the place of trial to Queens county, with costs to the defendant to abide the event. No opinion. All concurred.

**Allen N. Spence**, Respondent, v. **James Waldie**, Appellant.—Judgment of the Municipal Court affirmed, with costs. No opinion. All concurred.

**Bridget Regan**, Appellant, v. **The John Hancock Mutual Life Insurance Company**, Respondent.—Judgment of the Municipal Court affirmed, with costs. No opinion. All concurred.

**Max Goldberg**, Respondent, v. **Mary Grottjean**, Appellant.—Judgment of the Municipal Court affirmed, with costs. No opinion. All concurred.

In the Matter of the Petition of **Patrick W. Cullinan**, as State Commissioner of Excise, for an Order Revoking and Canceling Liquor Tax Certificate No. 21,361, Issued to **Charles C. Wissel**.—Order affirmed, with ten dollars costs and disbursements. No opinion. All concurred.

**Nils Nilsson**, Respondent, v. **Hugh De Haven**, Appellant.—Order affirmed, with ten dollars costs and disbursements. No opinion. All concurred.

**Peter De Witt**, Appellant, v. **Frank T. Pember** and **Charles E. McFadden**, Respondents, Impleaded with **Edward D. Woods**.—Order affirmed, with ten dollars costs and disbursements. No opinion. All concurred.

**Central Trust Company of New York**, Respondent, v. **New York and Westchester Water Company** and Others, Appellants.—Application to amend order *sumo pro tunc* granted, so as to allow the Corporation Trust Company to appeal to the Court of Appeals. Application denied, so far as it asks for the certification of additional questions.

**Lear Jager, Jr.**, Appellant, v. **The City of New York**, Respondent.—Motion denied.

**Dora S. Holbrook Brown** and Others, Appellants, v. **Ann Eliza Fish**, Respondent, Impleaded with Others, Defendants.—Motion denied.

**Marie Castagnette**, Respondent, v. **Charles Nicchia**, Appellant.—Motion denied.

**Anton Day**, Respondent, v. **Frederick Eisele**, Appellant, and **Frederick Borgwald**, Respondent.—Order reversed, so as to give respondents each his disbursements and one bill of costs to both.

The People of the State of New York ex rel. **John S. Brundage**, Respondent, v. **John J. Scannell**, as Fire Commissioner of the City of New York, Appellant.—In regard to those appeals which the corporation counsel can distinguish from the case already determined by the Court of Appeals, we think that the motion to dismiss the appeals should be denied, on such terms as may be just, and the city allowed to bring the cases to argument. As to the other cases, however, which at the last hearing he conceded to be indistinguishable, we think the appeals ought to be dismissed. Counsel may attend before this court on Tuesday, December ninth, at eleven A. M., for settlement of the order in accordance with this memorandum.

The People of the State of New York ex rel. **Delbert H. Decker**, Appellant, v. **Edward McCue** and Others, etc., and **Thomas L. Feitner** and Others, etc., Respondents.—Motion for resettlement granted and order signed.

In the Matter of the Foreclosure by the Chamberlain of the City of New York of Mortgage Made by **Amelia Crowley** to **Hubert G. Taylor**, as Treasurer of the County of Kings, upon the Property No. 88 St. Johns Place, Borough of Brooklyn, City of New York.—Application granted and order signed.

**George A. Hammel**, Appellant, v. **Thomas A. Gunn**, City Marshal, Respondent.—Motion granted on payment of ten dollars costs within five days from the entry and service of this order.

**Cocco Venanzio**, by his Guardian, etc., Appellant, v. **Levi C. Wier**, as President, etc., Respondent.—Motion denied.

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Blanche Hutchinson Harris, Respondent, v. Charles Taylor Harris, Appellant.—Order resettled by providing that the extension of time to serve amendments be stricken from the order appealed from, and that such time be limited to twenty days from the entry of this order.

Frederick G. Winn, Appellant, v. The New York Central and Hudson River Railroad Company, Respondent.—Motion denied.

In the Matter of the Judicial Settlement of the Account of William B. Davenport, as Administrator of the Goods, Chattels and Credits Which Were of Eliza T. White, Deceased.—All the questions which the present appellant now desires to take to the Court of Appeals can be taken there on appeal from the decree of the Surrogate's Court, if that decree shall be adverse to him, but inasmuch as it may be in his favor, they ought not to be certified at this time. There is no good reason why the proceeding may not be carried to a speedy conclusion without much expense or any such depletion to the estate as is apprehended. Motion denied.

In the Matter of the Application of the Board of Education, etc., Relative to Acquiring Title to Certain Lands on Bedford Avenue.

—The exception to that part of the referee's report which awards \$350.50 to Messrs. Mulqueen & Mulqueen, on account of their alleged lien, is sustained, and the report is otherwise confirmed. It is true that proceedings to condemn land are a special proceeding, and that under section 86 of the Code an attorney may acquire a lien in such a proceeding. This, however, is only from the commencement of the special proceeding. But Mrs. Schoenig had died before the petition of the board of education herein was filed. Hence, Messrs. Mulqueen & Mulqueen

could never have represented her in the proceeding. Therefore, they could not have acquired any lien. If they performed services for her in anticipation of the proceeding, under a contract of employment, her estate may be liable for such services upon a quantum meruit, but we are unable to see how they have any lien under the circumstances. In the Matter of the Application of the Board of Education of New York City to Condemn Property on West Third Street, Brooklyn, for School Purposes.—Report confirmed and order signed.

Pontus I. Thompson, Plaintiff, v. Emma A. Richardson and Others, Defendants.—No costs on this motion were awarded by our decision and none can be inserted in the order. Order signed.

Alexander Reisenberger, Appellant, v. Jacob Caminez, Respondent.—Judgment of the Municipal Court affirmed, with costs. No opinion. All concurred.

J. Warren Greene, Respondent, v. Charles H. Knox and Others, as Civil Service Commissioners, etc., and Others, Appellants.—Order resettled so as to allow one bill of costs and disbursements to the attorney for Edward A. Gaus and one bill of costs and all disbursements to the attorneys for the defendants Gannon and Lantry.

The People of the State of New York ex rel. Charles J. Carroll, Respondent, v. John J. Scannell, as Fire Commissioner of the City of New York, Appellant, and Forty-six Other Cases.—Motion denied in each case upon condition that the appellant pay ten dollars costs within five days, in each case, and prepare each case for argument at the opening of the January Term, 1903; otherwise motion granted, with ten dollars costs in each case.

## THIRD DEPARTMENT, DECEMBER TERM, 1902.

Norman Eckert, as Administrator, etc., of Charles Eckert, Deceased, Respondent, v. The Town of Shawangunk, Appellant.—Judgment and order reversed and new trial granted, with costs to appellant to abide event.—Appeal from a judgment entered upon the verdict of a jury and from an order denying a new trial.

KELLGEE, J.: The complaint charges that the defendant's commissioner of highways was negligent in not maintaining in proper repair a barrier on a public highway bordering on a dangerous embankment, and in suffering the barrier to become rotten and unsafe. It alleges that plaintiff's intestate, a boy eight years old, "while walking along said highway at the point or place where it passes over the said dam or embankment, without fault or negligence on his part but solely owing to the defendant's negligence as aforesaid was precipitated and fell into said pond \* \* \* by the breaking and giving away of the said barrier \* \* \* and was drowned." The facts as developed on the trial were briefly these: The highway was about eighteen feet wide where for some distance it ran along an embankment on one side of which was a mill pond. From the edge of the road the land sloped to the water at an angle of about forty-five degrees and was covered with brush and weeds. The distance down this slope from the edge of the highway to the water, at the time of the accident, was about seven feet. With care, a person could walk down and up the slope with reasonable safety. On the edge of the embankment, between the highway and the pond, was a barrier or a single rail about

two and one-half feet above the ground. The rail was four inches square, set upon posts about eight feet apart. The highway at this place had been maintained in this condition for forty years or more and no accident had ever happened. At the time of the accident the railing and posts were old and decayed and retained little resisting power. The commissioner knew or ought to have known their condition. The plaintiff's intestate was his son, a boy eight and one-half years old at the time of the accident, intelligent and familiar with this road and the pond, living near the pond some six hundred feet away from the place where the accident occurred, was accustomed to go alone to fish in the pond from its banks. His father says he "acted like a little man; like an older man. He would be fishing at times, would go out fishing by himself, got his rod and line." He seems also to have been venturesome. A witness says, "I know there is a bulkhead there extending out on the north side of the pond on this bank. I have seen that boy on that bulkhead. \* \* \* The bulkhead extends out in the pond as near as I can tell about twelve feet, and I should judge is about three feet wide. I spoke to the boy and told him to get off of it. \* \* \* I told him to get off the bulkhead and to go home. \* \* \* I think it was the year before June, 1901." In June, 1901, at six o'clock in the afternoon, the boy started to go along this road, telling his mother that he was going to pick strawberries. This was the last seen of him. Within fifteen or twenty minutes after leaving home a neighbor called and said that the boy's hat

was floating in the pond a few feet from this embankment, and within a short time his body was recovered in twelve or fifteen feet of water some fifteen feet from the embankment where it touches the water. The railing or barrier at this point was broken down, and, though the evidence was conflicting, the jury might properly have found that the railing was up just before the accident. Several witnesses saw a small dead fish floating close to the shore opposite the place where the railing had fallen. One of plaintiff's witnesses says, "I saw a dead fish. It laid up against the shore, between the hat and the shore. It was a small fish that looked like it had been there for quite a while. \* \* \* I wouldn't want to say whether the fish was in such a position that a person passing on the highway would see it from the roadway. I saw it as I stepped off the highway down towards the water's edge." From the evidence I think a jury might properly find that in some way the barrier was broken down by the boy and its giving away precipitated the boy into the water. It is wholly problematical whether the boy saw the fish at all, and if he did whether he was seeking to possess himself of it; whether for that purpose he sought to get over the railing or under it, using it as a support in gaining a foothold in the embankment and it broke down, or whether he was leaning against the railing when it broke down. Judging from what we know of the natural curiosity and propensity of boys of that age, with this boy's experience, it is not difficult to reach a conclusion, in the absence of all other proof, that if in fact the boy saw the fish he was trying to get possession of it when he fell into the water; that he was trying to get through or over the barrier in order to go down the bank to the water which was only seven feet from the edge of the highway. In the absence of all proof as to how the barrier came to be broken down, the circumstances surrounding this accident leave room only for speculation. If the boy was in fact seeking to get through or over this railing for any purpose he did not meet his accident "while walking along said highway." The theory urged by counsel, that the boy was leaning against the railing, watching the fish, has no evidence to support it, and the theory is not so reasonable as that the boy coveted the fish and was attempting to possess it, and in some way was trying to surmount the railing when it broke down. In support of the right of the boy to lean against the railing, counsel for plaintiff cites the case of *Langlois v. City of Cohoes* (58 Hun, 226). Learned, P. J., said: "The railing of the bridge should be sufficient to meet all those incidental uses to which it would reasonably be put by persons crossing. We say nothing about sitting on the rail. We speak merely of that leaning against it which is the common act of a person stopping a moment for any purpose on the sidewalk of a bridge." The "incidental uses" to which this railing of this embankment would reasonably be put does not include sitting upon it, or climbing over it, or getting through it for any purpose. I do not see that it makes any difference in such a case whether the boy was or was not *sui juris*. If *non sui juris* it still remains a question as to whether the defendant was negligent in not apprehending that any infant might on this remote highway try to get on, over or through this barrier. I do not think that commissioners of highways of towns, under such conditions, are bound to apprehend or provide against such a remote contingency. If it can be said that the boy had a right to

lean against the railing, and the proof were that he did lean against it, which caused it to break down, a difficult case would be presented. But the field is entirely one for speculation, and when there are two possible causes of the accident, one of which imputes negligence to the commissioner and one does not, the jury has no right to choose. It is mere speculation, and a verdict in such a case cannot be supported by the evidence. Upon the complaint in this case, and the evidence given to support the alleged cause of action, I think the motion for nonsuit should have prevailed. The judgment is reversed, a new trial granted, with costs to appellant to abide the event. All concurred. Noah D. Stage, Appellant, v. Daniel J. Van Leuven, Respondent.—Judgment unanimously affirmed, with costs.—Appeal from a judgment of nonsuit directed at the close of the plaintiff's case.—

*Kellogg, J.*: The plaintiff delivered to the defendant on January 3, 1900, a chattel mortgage to secure the payment of \$361. A portion of the property mortgaged consisted of a stock of groceries. The mortgage contained the provision, "in case the said Daniel J. Van Leuven (the mortgagee) or his assigns shall at any time deem himself or said property, debt or security unsafe, it shall be lawful for him to take possession of said property and to sell the same," etc. Immediately upon giving the mortgage the plaintiff (mortgagor) proceeded to sell the groceries at retail and at the rate of ten to fifteen dollars per day and continued to sell until February 24, 1900, using the proceeds of sale for various purposes, but none of it to pay the mortgage debt. On the date last named the mortgagee, claiming that he deemed the property and security unsafe, took possession of the groceries and immediately the mortgagor commenced this action in replevin of the property so taken by the mortgagee. On the trial the defendant gave no testimony. The testimony offered by the plaintiff does not, in my opinion, in any manner attack the good faith of defendant in taking possession of the mortgaged property. There is nothing in the evidence from which it can be inferred that defendant did not deem himself or his security unsafe, and there is much which would be apt to produce in a prudent man a feeling of uneasiness. The security was diminishing at the rate of ten to fifteen dollars per day. The margin of value over the mortgage does not appear to have been great, if any at all. So I think the plaintiff wholly failed to present facts from which a jury could properly find that defendant acted in bad faith and did not "deem himself or said property, debt or security unsafe," or that defendant acted from any other than prudential motives. There was, therefore, nothing to submit to the jury. The burden of proof in cases where bad faith is charged is upon the party alleging it. If no proof is offered upon which bad faith can be predicated the presumption of good faith remains unassailed. The allegation of unlawful taking is not proven. (*Jones Chat. Mort.* § 431; *Smith v. Post*, 1 Hun, 516; *Allen v. Vose*, 34 Id. 57; *Champagne v. Powell Medicine Co.*, 48 App. Div. 348.) The judgment should be affirmed, with costs.

*Sarah M. Walt, Respondent, v. Henry B. Dauchy, as Administrator with the Will Annexed of Josiah A. Walt, Deceased, Appellant.*—Order affirmed, with ten dollars costs and disbursements.—Appeal by the defendant from an order dated the 27th day of September, 1902, and entered in the office



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of the clerk of the county of Rensselaer on the 3d day of October, 1902, denying the motion made by the defendant at the Albany Special Term for a further bill of particulars and items of account of the plaintiff's complaint.—

CHASE, J.: Plaintiff was the wife of the defendant's testator. This action is brought to recover moneys alleged to have been collected and received by defendant's testator for plaintiff's use while conducting a farm and milk route for her. Plaintiff furnished the defendant with a bill of particulars stating a specific sum as the amount so collected and received each year during the times mentioned in the complaint. Ordinarily, a further bill of particulars ought to be furnished by a plaintiff in such an action. This motion is made on the papers served in the action and an affidavit of the defendant stating sufficient reasons why a further bill of particulars should be ordered by the court. The plaintiff, however, in an affidavit in reply states that her husband had full control of said farm and milk route; that she never kept any account or memorandum of the receipts and collections made by her husband; that her husband "kept separate and private books of account containing the items, amounts, time of receipt, persons from whom he received and collected moneys;" that said book or books were on the night of her husband's death, or on the next night thereafter, removed from his office by one S., his son-in-law, and that they are now in the possession of one of defendant's attorneys; that it will be impossible for her to furnish "all the particulars required by the defendant unless the defendant is required to produce and deposit in some proper and convenient place the book or books \* \* \*

and permit plaintiff or her attorney or some suitable person authorized by plaintiff to make an inspection of said books and papers and to make extracts of the entries of the collections and receipts therein." Defendant did not offer to produce the books referred to in the plaintiff's affidavit or serve a reply to her statements in regard to the same. The order denying defendant's motion should be affirmed. All concurred.

Horace H. Dibble, Claimant, Appellant, v. The State of New York, Respondent.— Judgment reversed on law and facts, with costs to the claimant, and new trial granted in the Court of Claims.— Appeal by Horace H. Dibble from a judgment of the Court of Claims, made and entered in the office of the clerk of said court on the 18th day of February, 1897, for alleged insufficiency of the judgment. The claimant is the owner of a piece of land near the Champlain canal. The State of New York maintains a spillway or waste weir by and through which the surplus water in said canal is drawn and discharged into Bond creek, running through said lands of claimant. The Court of Claims found that "the officers, agents and servants of the State of New York in charge of said canal, spillway and waste weir negligently and carelessly drew water in large quantities and of great volume from said Champlain canal through said spillway or waste weir and discharged the same into Bond Creek, and so negligently kept said wickets, gates or waste weir open until the channel of Bond Creek was filled, and did thereby cause the water to overflow the banks of said creek and to overflow to some extent the lands of said claimant, and thereby injured and destroyed a crop of potatoes growing thereon." The court found the damage amounted to ninety-five dollars.—

CHASE, J.: The only question for our consideration is the amount of the damages. The court having found that the potatoes were injured and destroyed by the negligence of the defendant, the measure of damages is the value of the crop. The lowest estimate of said value as shown by the evidence is much more than the amount of the judgment. The court did not view the premises, and consequently all the evidence before the lower court is now before this court. The Court of Claims, like other courts, must render judgment on the evidence presented to it. A judgment of a court not based on the evidence is arbitrary and unauthorized and requires a reversal by the appellate court. We do not modify the judgment, as we are of the opinion that a new trial may show with greater certainty the facts relating to the claim and the extent of the claimant's alleged injury. Judgment reversed, with costs to the claimant, and a new trial granted in the Court of Claims. All concurred.

Mary Clark, Respondent, v. Benjamin N. Disbrow, Appellant, Impleaded with Josephine L. Disbrow.— Judgment and order unanimously affirmed, with costs.— Appeal by Benjamin N. Disbrow from a judgment dated the 28th day of June, 1900, and entered in the office of the clerk of the county of Montgomery on that day in favor of the plaintiff upon the verdict of a jury rendered at the Montgomery Trial Term; also from an order made at said Trial Term, dated the 22d day of May, 1900, denying the said defendant's motion to set aside the verdict and for a new trial made on the minutes.—

CHASE, J.: The plaintiff, on the 18th day of May, 1890, while rightfully in a private road leading into a cemetery, was injured by a dog that suddenly jumped upon her back and bit her shoulder. The farm over which the private road passed was owned by two infant children of the appellant's wife. Prior to September 25, 1894, appellant and his family, including the said children of his wife by a former marriage, resided on said farm. While they so resided on said farm the dog, which was then owned by one of said children, was brought in a car from New York. The appellant looked after the dog, and with a boy took him from the car to the farm. It is stipulated in the action that "At the time of the acts complained of they (appellant and his wife) were in the occupation of the farm, but not living there; John Tesnow being in their employ and living upon and working the farm." When appellant and his family, including said infant children, left the farm the dog was left with Tesnow, the tenant on the farm. The viciousness of the dog is satisfactorily established. In October, 1895, a young girl went to Tesnow's house and opened the door, and just as she opened the door the dog rushed at her and bit her wrist, so that his teeth penetrated to the bone, and Mrs. Tesnow came and took the dog away. On another occasion a man going through the same private road was chased by the dog, and to escape from him he climbed a tree and remained in the tree until Tesnow came and took the dog away. On another occasion a neighbor came down the stairs of his barn and found the dog in the barn, and he attempted to drive the dog away, when the dog leaped at him, and to escape the dog he ran back up the stairs and closed a trap door. For some time prior to the plaintiff's being bitten Tesnow ordinarily had the dog chained near the workshop, and while so chained he growled with mouth opened and started at people passing near



him. Although the appellant was not the owner of the farm he personally assumed direction thereof. The appellant after testifying to directions given by him further testified: "Q. Why did you send word up to John? A. I had been doing the business for the children. Q. What business? A. Looking after the place and for my wife too." Every direction to the tenant in regard to the dog so far as the record shows came from the appellant, and when the plaintiff was bitten the tenant notified the appellant and he came to the farm, and subsequently he gave the dog away, and when the person to whom the dog was given had some trouble with him and refused to keep him the dog by the appellant's direction was killed. Shortly after the plaintiff was bitten, and while the appellant was at the farm, in response to Tesnow's notice, the plaintiff's husband said to the appellant, "My wife is not the first one he bit; he bit Mr. Hout's girl," and the appellant responded, "He did that in play, she had candy in her hand and he wanted to play with her." The appellant denied such conversation, and further testified: "Q. When you were at Mrs. Clark's house talking with Mr. Clark had you ever heard before that that the Hout girl had been bitten? A. No; I told him I didn't know anything about the dog being ugly." We are of the opinion that there was presented in this case under all the circumstances a question of fact as to the appellant's being in entire charge and control of the dog and as to his knowledge of its viciousness that justified its presentation to the jury for their determination. Judgment and order affirmed, with costs.

**Detroit Stove Works, Appellant, v. Dudley Gill, as Sheriff of the County of Warren, Respondent.**—Judgment affirmed, with costs. No opinion. All concurred.

**John Foley, Appellant, v. The Lawrence Cement Company, Respondent.**—Judgment and order unanimously affirmed, with costs. No opinion.

**Joseph Foster, Jr., Appellant, v. International Paper Company, Respondent.**—Order affirmed, with ten dollars costs and disbursements. No opinion. All concurred.

**James L. Jacobs, Respondent, v. St. Regis Paper Company, Appellant.**—Judgment affirmed, with costs, on opinion in *Farmers' National Bank v. St. Regis Paper Co.* (ante, p. 558). All concurred.

**William L. Mead, Appellant, v. The State of New York, Respondent.**—Judgment of the Court of Claims unanimously affirmed, with costs. No opinion.

**In the Matter of the Application of Elmira Trust Company to Be Designated as a Deposit Bank for Court Funds.**—Referred to Burton S. Chamberlain, Esq., of Elmira, to take proof and submit the same, with his opinion, to the court.

**William Welbrick, Appellant, v. The State of New York, Respondent.**—Judgment of the Court of Claims unanimously affirmed, with costs. No opinion.

**Susan J. Husted, Appellant, v. The Village of Castleton, Respondent.**—Judgment unanimously affirmed, with costs. No opinion.

**J. Samuel Lemon, as Administrator, etc., v. Maxwell Smith and Others.**—Motion denied.

**Mary J. Lighthall, Appellant, v. Village of Saratoga Springs, Respondent.**—Judgment unanimously affirmed, with costs. No opinion.

**New York State Convention of Universalists, Respondent, v. First Universalist Church of Glens Falls, Eugene Viele, Individually, and as Trustee of the First Universalist Church**

**of Glens Falls, Defendants, and Thomas D. Trumbull, Jr., and Emma Newton, Individually, and as Trustees of the First Universalist Church of Glens Falls, Appellants.**—Order affirmed, with ten dollars costs and disbursements. No opinion. All concurred.

**James Powderly, Appellant, v. Sooyamith & Company, Respondent.**—Judgment unanimously affirmed, with costs. No opinion. Chase, J., not sitting.

**John Lewis Putnam and Others, Appellants, v. John R. Putnam and Others, Respondents.**—Motion denied.

**George D. Polhemus, as Administrator, etc., of Herbert Polhemus, Deceased, Respondent, v. Cornell Steamboat Company, Appellant.**—Motion denied.

**The People of the State of New York ex rel. The Town of Walton, Appellant, v. The Board of Supervisors of Delaware County, Respondent.**—Motion granted, and in addition thereto there should be added to the order proposed, "the court holding that apart from the legal grounds the court below should have exercised its discretion in favor of granting the motion."

**Oscar N. Whitney, as Assignee of The People's Building, Loan and Savings Association, Appellant, v. Nicholas B. Platz and Another, Respondents.**—Judgment and order affirmed, with costs. No opinion. All concurred; Chase, J., not voting.

**Isabella Beattie, Appellant, v. Schenectady Railway Company, Respondent.**—Order reversed, with ten dollars costs and disbursements, and motion to vacate injunction denied, with ten dollars costs. Injunction modified by striking out that part thereof which reads as follows: "And that they be further enjoined and restrained, until the further order of the court, from interfering with the removal of the railroad poles and wires, and the restoration of the street by the plaintiff herein," upon opinion in *Paige v. Schenectady Railway Company* (ante, p. 571). All concurred, except Kellogg, J., dissenting.

**Caroline Paige Lansing, Appellant, v. Schenectady Railway Company, Respondent.**—Order reversed, with ten dollars costs and disbursements, and motion to vacate injunction denied, with ten dollars costs.—Injunction modified by striking out that part thereof which reads as follows: "And that they be further enjoined and restrained, until the further order of the court, from interfering with the restoration of the street by the plaintiff herein and from in any way using the pole which it has put up on the premises," upon opinion in *Paige v. Schenectady Railway Company* (ante, p. 571). All concurred, except Kellogg, J., dissenting.

**Isabella L. Lake, as Administratrix, etc., of Hiram Lake, Deceased, Respondent, v. George W. Anderson, Appellant.**—Motion denied.

**Howard McKinlay, Appellant, v. Margaret Van Dusen and Others, Respondents.**—Motion granted.

**In the Matter of the Application of Oneonta, Cooperstown and Richfield Springs Railway Company for the Appointment of Commissioners to Determine Whether a Street Surface Railroad Ought to Be Constructed and Operated upon Lake and Church Streets, Being a Continuous Street or Highway in the Village of Richfield Springs, in the County of Otsego and State of New York.**—Application granted, and the following persons appointed commissioners: Charles Davis, of Saugerties, N. Y.; George S. Andrews, of Owego, N. Y., and William W. Worden, of Saratoga Springs, N. Y. Ordered that the question under the statute\* of

\* Laws of 1890, chap. 555, art. 4, as amd.—[RER.]

- public necessity and convenience be referred to this commission. All other questions are reserved until the coming in of that report. Order to be settled by Chester, J., if not agreed upon.
- In the Matter of the Examination of The Adirondack Trust Company upon its Application to Be Named as a Depository of Court Funds**—Motion granted.
- New York Cement Company, Respondent, v. Consolidated Rosendale Cement Company, Appellant.**—Motion denied.
- New York Cement Company, Respondent, v. Consolidated Rosendale Cement Company, Appellant.**—Motion denied.
- The People of the State of New York ex rel. New York, New Haven and Hartford Railroad Company, Appellant, v. Board of Railroad Commissioners of the State of New York, and Ashley W. Cole and Others, Members of and Comprising said Board, and the New York and Port Chester Railroad Company, Respondents.**—Motion denied. Chester, J., not sitting.
- The People of the State of New York v. Metropolitan Mutual Savings and Loan Association.**—Motion denied. Chester, J., not sitting.
- The People of the State of New York v. Metropolitan Mutual Savings and Loan Association.**—Motion denied. Chester, J., not sitting.
- Catherine Stevens, Plaintiff, v. Patrick Cunningham, as Administrator, etc., of Bridget Walsh, Deceased, Defendant.**—Motion denied.
- Louise A. Thompson, Appellant, v. Schenectady Railway Company, Respondent.**—Order reversed, with ten dollars costs and disbursements, and motion to vacate injunction denied, with ten dollars costs. Injunction modified by striking out that part thereof which reads as follows: "And that they be further enjoined and restrained, until the further order of the court, from interfering with the removal of the railroad poles and wires and the restoration of the street by the plaintiff herein," upon opinion in *Paige v. Schenectady Railway Company* (ante, p. 571). All concurred, except Kellogg, J., dissenting.
- Jacob V. Vrooman, Appellant, v. Schenectady Railway Company, Respondent.**—Order reversed, with ten dollars costs and disbursements, and motion to vacate injunction denied, with ten dollars costs. Injunction modified by striking out that part thereof which reads as follows: "And that they be further enjoined and restrained, until the further order of the court, from interfering with the removal of the railroad poles and wires and the restoration of the street by the plaintiff herein," upon opinion in *Paige v. Schenectady Railway Company* (ante, p. 571). All concurred, except Kellogg, J., dissenting.
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**ATTORNEY AND CLIENT** — *Assignment of a lease by an uneducated client to his legal adviser — in an action by the client to set it aside the burden of showing that no unfair advantage was taken rests on the attorney.*] 1. In an action brought to have an assignment of a lease of certain real estate in the city of New York declared fraudulent and void or to have such assignment declared one in trust for the benefit of the plaintiff's creditors and reformed accordingly, it appeared that the plaintiff, who was a man well advanced in years and barely able to read and write, in 1891 took a lease for a term of ten years, with the privilege of fifteen years' renewal, of certain real estate in the city of New York at an annual rental of \$5,000; that in 1895, after the plaintiff had erected buildings upon the leasehold estate, costing upwards of \$21,000, he obtained a loan from one Ruppert of \$6,000 and gave as security for the payment thereof a mortgage upon his leasehold estate.

At the time the loan was made one Fitch was Ruppert's attorney, and the defendant, who was a lawyer employed in Fitch's office, attended to a considerable part of Ruppert's business, including the loan to the plaintiff. The plaintiff spent the money loaned to him by Ruppert in the erection of new buildings upon the premises, and in December, 1895, the sums invested by him in buildings amounted to over \$30,000. At about this time his unsecured claims amounted to \$2,100 and the holders of such claims were pressing him for payment. He then applied to Ruppert for a further loan sufficient to pay off the claims, but his application was denied. He persisted in renewing such application and frequently advised and consulted with the defendant; gave the latter a list of his creditors together with the amount of their respective claims; informed him as to the details of his property and business and the income therefrom. In April, 1896, he was finally advised, either by the defendant or some one else apparently acting in Ruppert's interest, to make an assignment of his lease to the defendant, and that if he did not do so an action would be instituted to foreclose the Ruppert mortgage. Upon his refusal to make the assignment an action was commenced on the 10th day of April, 1896, to foreclose the Ruppert mortgage.

The plaintiff then applied to the defendant to aid him in effecting a settlement with Ruppert. He was unable to effect such a settlement, and three days after the foreclosure action was instituted the plaintiff delivered to the defendant, for the nominal consideration of one dollar, an absolute assignment of the lease, including the right of renewal. The defendant, however, who drew the lease himself, testified that the actual consideration therefor was an agreement by him to pay off the plaintiff's unsecured claims, satisfy and discharge one-half of the Ruppert mortgage and divide equally with the plaintiff the net rents received. The plaintiff contradicted this testimony and alleged that when the defendant read the lease to him he did not read it according to its terms. Immediately after the execution of the assignment the defendant took possession of the leasehold estate, collected the rents and paid one-half to the plaintiff, retaining the other half for himself. The amount which the defendant received from the premises amounted to about \$142.50 a month.

The trial court, while of the opinion that the transaction was suspicious as far as the defendant was concerned, reached the conclusion that this was not enough to warrant the correction of the assignment for fraud or mistake, and dismissed the plaintiff's complaint.

*Held*, that, under the circumstances disclosed by the evidence, it was incumbent upon the defendant to prove that the plaintiff fully understood

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the contents and effect of the assignment of the lease and to show that the defendant did not take undue and unconscionable advantage of the plaintiff:

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4. — *Agreement by an attorney to pay costs.*] *Semble*, that a provision in an attorney's contract of retainer, by which the attorney agrees to pay the costs of the litigation, renders the contract void. *Id.*

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He further testified to a previous conversation with Sweeny, in which the latter said that "if anything ever happened to him he wanted me to have the money; that I had always been his friend, and he had no one else to give it to." A few days after delivering the bank books to the plaintiff Sweeny disappeared and was never heard from thereafter. The plaintiff made no claim against the bank for seven years after Sweeny's disappearance.

The plaintiff's son, in testifying to the alleged gift, stated that Sweeny said, "Boss, here is two bank books; that money in the bank belongs to you; I want to give it to you; this money has been an absolute curse to me," and that he handed the bank books to the plaintiff.

The witness Clark, referred to by the plaintiff in his testimony, testified that at the time in question Sweeny handed two bank books to the plaintiff, saying, "Here, use these two bank books that have been a curse to me ever

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since I have had them, for I cannot keep sober, and whatever is in the banks, these books is yours if anything happens to me."

*Held*, that it was error for the court to refuse to charge that "if Sweeney at the time of the alleged gift said that Tyrrel (the plaintiff) was to have the money if anything happened to him, that the jury should find for the defendant."

In order to establish a valid gift a delivery of the subject of the gift to the donee or to some person for him, divesting the donor of possession and title to the gift, must be shown. *TYRREL v. EMIGRANT INDUSTRIAL SAV. BANK.* 181

2. — *A savings bank deposit made "in trust" for another — an implication arises therefrom, in the absence of proof to the contrary, of an intention to create a trust — it is not rebutted by the fact that the money is subsequently withdrawn.* In October, 1899, a woman opened a savings bank account in her own name in trust for her husband, and deposited therein sums which, with interest, aggregated \$1,397.56. In May, 1900, she drew out all of such sums and gave \$650 thereof to her daughter. She died in July, 1900, without disclosing to her husband the existence of the account or making any declaration in respect thereto.

*Held*, that, in the absence of testimony showing a contrary intention, the opening of the account in trust furnished sufficient proof that the woman intended to create a trust in favor of her husband;

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"This agreement made this 22nd day of November, 1897, by and between Francis W. Gridley and Willis T. Gridley, of Syracuse, N. Y., of the first part, and Frank M. Bonta, of the same place, of the second part, Witnesseth:

"WHEREAS, parties of the first part, being large holders of the capital stock of the Salt Springs National Bank of Syracuse, are desirous that said second party should purchase stock thereof, and should remain with said bank and use his time and influence to promote its prosperity; now, in consideration of the covenants and agreements herein contained, to be performed by said second party, said parties of the first part jointly and severally covenant and agree to and with said party of the second part as follows:

"1. The said party of the second part shall be elected (unless he, himself, uses his own influence to prevent his election) cashier of the Salt Springs National Bank at the annual meeting thereof, to be held in January, 1898, and shall continue to hold such office for the space of five (5) years, or until the annual meeting to be held in January, 1903, unless he sooner voluntarily resigns such position as hereinafter provided.

"2. He shall receive for his services as such cashier the annual salary of twenty-five hundred dollars (\$2,500).

"3. He shall have the power and authority and shall perform the duties usually performed by cashiers of National Banks in Syracuse, not inconsistent with law, subject to the by-laws of the bank and the resolutions of the discount committee and Board of Directors of said bank relative to loans.

"4. Said first parties will purchase of said second party the fifty (50) shares of the capital stock of said bank purchased by him, as herein provided, at any time when he ceases to be cashier thereof, and pay him one hundred and thirty-five dollars (\$135) per share therefor.

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"In consideration of the premises said party of the second part covenants and agrees to and with said parties of the first part, that during the five years above described, or so long as he may remain cashier of said Salt Springs National Bank (he hereby expressly reserving the right to resign such position at any time), he will devote his whole time and attention to the promotion of the interests of the said Salt Springs National Bank, and will exercise such influence as he may possess in favor of said bank and toward retaining the services of the present board of directors. He further covenants and agrees to buy fifty shares of the capital stock of the Salt Springs National Bank at a price not to exceed one hundred and thirty-five dollars (\$135) per share;"

That the plaintiff purchased fifty shares of the capital stock of the bank for \$185 per share and entered upon the performance of his duties as cashier; that he faithfully performed all the conditions of the contract on his part until September 11, 1901, when he was discharged, without cause, from his position as cashier; that he then tendered the fifty shares of stock to the defendants and demanded the sum of \$185 per share therefor; that, upon their failure to comply with such demand, he sold the stock at public auction and received therefor \$100 per share.

The action was brought to recover damages for the breach of the contract. The plaintiff demanded judgment in the sum of \$3,750, representing the loss of \$35 per share on the fifty shares of stock and \$3,000 as liquidated damages pursuant to a clause in the contract.

*Held*, that an interlocutory judgment overruling a demurrer to the complaint should be affirmed:

That the contract set forth in the complaint was not void as against public policy;

That as the plaintiff had fully performed his part of the contract, and the defendants had had the benefit of such performance for a period of four years, the latter should not be permitted to urge its invalidity.

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2. — *Specific performance of a contract, alleged to have been made by one since deceased to devise a house to a relative in consideration of the latter's agreement to care for her.* For several years prior to the death of a childless widow, she and one of her nieces and the latter's husband occupied separate apartments in a house owned by the widow in the city of Buffalo. After the widow had died intestate the niece brought an action against the decedent's personal representative and heirs at law to compel the specific performance of a parol contract alleged to have been entered into between the plaintiff and the decedent at a time when the plaintiff and her husband contemplated moving to the city of Boston, by the terms of which the decedent agreed that if the plaintiff would abandon that intention and would take care of the decedent as long as she lived she would will to the plaintiff the house in which they resided.

The existence of the oral contract rested entirely upon the testimony of the plaintiff's husband, and he testified that at the time such contract was made nothing was said as to the manner in which the decedent was to be taken care of. At the time the alleged contract was made the decedent managed her own household affairs without the assistance of the plaintiff, and no change was thereafter made in her manner of living.

It further appeared that neither the plaintiff nor her husband ever alluded to the alleged contract until the action was commenced, and that after the decedent's death they moved away from the house to which the contract related without asserting its existence.

*Held*, that a judgment directing the specific performance of the contract should be reversed for the following reasons, viz.: That the existence of the contract had not been sufficiently proved; that the terms of the contract, if made, were so vague and indefinite that it was not possible to ascertain the full intention of the parties therefrom, and that there had been no such part performance thereof as to justify the court in directing specific performance. BRAUN v. OCHS.....

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8. — *Written contract of guaranty—when a consideration therefor is to be inferred from its terms.* Under the Statute of Frauds, as it now exists, the

**CONTRACT — Continued.**

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consideration supporting a contract of guaranty must be expressed in the written contract or be fairly inferable therefrom.

In arriving at a correct construction of the written contract all of the facts and circumstances connected with its delivery, the reasons therefor and the purpose to be accomplished thereby may be shown by parol proof.

In an action brought by the Union National Bank of Lewisburg, Pennsylvania, to charge James D. Leary upon a contract of guaranty embraced in the following letter written by Leary to one Himmelrich, the president of the plaintiff bank, "The Union Nat. Bank of Lewisburg, Pa., now holds two notes of The John Good Cordage & Machine Co. to the order of John Good, one for \$4,500 and one for \$2,500. I will be personally responsible for the payment of the two notes, with interest, within a reasonable time to The Union Nat'l Bk. of Lewisburg," it appeared that the guaranty was executed and delivered pursuant to an agreement, made between Leary and Himmelrich, by which each agreed to pay one-half of the amount of the notes and interest thereon and receive in payment therefor bonds of the John Good Cordage and Machine Company; that as a result of the execution and delivery of the guaranty, the plaintiff forbore, in reliance thereon, to enforce payment of the notes.

*Held*, that the language of the instrument of guaranty fairly gave rise to the inference that the consideration for its execution was the agreement to forbear the enforcement of the notes for a reasonable time, and that such consideration was sufficient to support the guaranty.

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4. — *Incorporation in a public contract of unconstitutional provisions of the Labor Law — its execution not enjoined at the suit of a taxpayer.*] The fact that provisions of the Labor Law (Laws of 1897, chap. 415, as amd.), inserted pursuant to a mandate of the Legislature in a contract made between the commissioners of the New East River Bridge and a steel company for the construction of the approaches to such bridge, have, since the execution of the contract, been declared unconstitutional by the Court of Appeals, does not entitle a taxpayer of the city of New York to an injunction restraining the execution of such contract, especially when it appears that, at the time such contract was made, the Appellate Division had decided that the provisions in question were properly inserted therein, and when it also appears that there is no allegation in the complaint that the contractor has refused to comply with any of the conditions of the contract on the ground of their unconstitutionality.

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5. — *Provision requiring material of a particular kind and that the contractor shall have had a plant in operation for a year.*] The commissioners of the New East River Bridge had power to insert in the specifications for the bridge provisions prescribing the character of the steel desired and requiring that the bidder should have had a plant in operation for a year. *Id.*

6. — *Improvement of the Erie canal under the act of 1895 — it was abandoned, not suspended.*] The action of the State of New York, upon and after the 14th day of May, 1898, in reference to the work of improving the Erie canal, which had been undertaken pursuant to chapter 79 of the Laws of 1895, was an abandonment of the work and not a mere "suspension" thereof within the meaning of a clause in the contracts for a portion of the work which provided that if the execution of the contracts should be suspended by the State at any time for any cause, no claim for prospective profits on work not done should be made and allowed, but that the contractors should complete the work when the State ordered its resumption.

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7. — *The State was not authorized by the contracts to abandon it.*] The right to abandon the work before completion without incurring any liability to the contractor for prospective damages was not reserved to the State under a provision of the bid upon which the contract was founded, by which the contractor offered "to construct and to finish, so far as the superintendent of public works shall direct, all of the work to which prices are affixed in the above schedule in all respects according to the contract and specifications,"

**CONTRACT — Continued.**

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or by a provision in the contract that the work should be "prosecuted at the times and in the manner directed by the resident engineer" or by a clause in the specifications providing, "the State reserves the right to increase or diminish the amount or amounts of any class of work from the amount shown on the bidding sheet," and that in that event the amount of work *required* would be done at the rates named in the contract, and no claim for damages or prospective profits would be made on account of such change. *Id.*

8. — *Right of the contractors to recover damages for the breach.*] The abandonment of the work entitled the contractors to recover the money deposited by them as security for the faithful performance of the contracts and the balance due for work actually done thereunder, and — assuming that the aggregate of all the bids for the work was within the \$9,000,000 authorized to be expended upon the improvement and that, at the time of the execution of the various contracts, the \$9,000,000 was apportioned to the several contractors up to the amount of their respective bids — each contractor would also be entitled to recover such prospective damages, not exceeding the amount of his bid, as he could show that he had suffered by reason of the abandonment of the work. *Id.*

9. — *Contract by exchange of telegrams contemplating the execution of a final written agreement — enforceable although no writing is executed.*] Where, by means of telegrams exchanged between two parties, a definite proposition containing all the requirements of a complete contract is made by one and accepted by the other, with the understanding that the agreement will be expressed in a formal writing, the failure to execute the formal writing does not affect the validity of the contract.

The foregoing rule does not apply where part only of the terms of a contract are agreed upon and the parties intend that such terms and others not yet agreed upon shall be expressed in one written agreement.

BRAUER v. OCEANIC STEAM NAVIGATION Co. . . . . 407

10. — *Entire contract — delivery and payment.*] When a contract for the publication of a book is an entire one which does not require delivery prior to receiving payment, considered.

BLUMENBERG PRESS v. MUTUAL MER. AGENCY . . . . . 87

11. — *Construction in favor of validity.*] A construction which makes an instrument valid will be preferred to one which makes it invalid.

UNION TRUST Co. v. OWEN . . . . . 60

— To erect a school building in the city of Little Falls — its board of education is not a corporation — the city is liable on contracts made by the board — when a failure to obey a statutory provision as to contracting a city debt is not available to the city as a defense to such a contract — nor the absence of a formal consent of the architect — what subletting of work to be done under a city contract does not violate chapter 444 of the Laws of 1897 — waiver of an architect's certificate.

OCCOR & RUGG Co. v. CITY OF LITTLE FALLS . . . . . 593

See MUNICIPAL CORPORATION.

— With a municipality — an architect's certificate required thereby must be produced or an excuse pleaded for not doing so — rights of the contractor where the city completes the work at less than the contract price — specifications requiring the construction of a watertight flue — the contractor does not guarantee the efficiency of the specifications to secure that result.

DWYER v. THE MAYOR OF NEW YORK . . . . . 234

See MUNICIPAL CORPORATION.

— Agreement by a person to leave all his property to one who should live with him as a daughter — specific performance thereof — action against the promisor's administrators and heirs. HALL v. GILMAN. (No. 1). . . . . 458

See PLEADING.

— Execution of a contract by a corporation — when proof of the signatures thereto of its president and secretary and of the affixing of the corporate seal is insufficient. QUACKENBOSCH v. GLOBE & R. FIRE INS. Co. . . . . 168

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**CONTRACT — Continued.**

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— Champerty — agreement by an attorney to pay out of his compensation a debt of the client — agreement by an attorney to pay costs — unconscionable contract. *MATTER OF FITZSIMONS*..... 345  
*See ATTORNEY AND CLIENT.*

— Not within the scope of a corporation's business — it must be authorized by the board of directors. *LEARY v. ALBANY BREWING CO.*..... 6  
*See PRINCIPAL AND AGENT.*

— *Deposit in bank.*  
*See BANKING.*

— *Relating to negotiable paper.*  
*See BILLS AND NOTES.*

— *Of insurance.*  
*See INSURANCE.*

— *Of copartnership.*  
*See PARTNERSHIP.*

— *Of suretyship.*  
*See PRINCIPAL AND SURETY.*

— *Of sale of personal property.*  
*See SALE.*

**CONTRIBUTORY NEGLIGENCE:**

*See NEGLIGENCE.*

**CONVERSION — Of personal property.**

*See PERSONAL PROPERTY.*

**CONVEYANCE:**

*See DEED.*

**CORPORATION** — *De facto corporation — what proof of its existence is insufficient to establish the liability of a director for its debts.*] 1. In order to establish the existence of a *de facto* corporation it is necessary to show not only that there is a law under which the corporation might be organized and an attempt to organize it, but that corporate powers have been exercised, *i. e.*, that the corporation has exercised its particular franchise by doing business under it.

A certificate of incorporation which recited that the object of the corporation was "to do a general publishing and printing business," was filed in the Secretary of State's office December 21, 1899, but the incorporation was defective because no certificate was filed in the office of the clerk of the county of New York, which was the place at which the corporate business was to be conducted. December 22, 1899, the board of directors held a meeting at which the sole business transacted was the election of officers and the passage of the following resolution;

"Whereas it is necessary for the welfare of the company to acquire certain rights now owned by Raymond L. Donnell in order to enter into business, it is hereby Resolved, that the proper officers be and are hereby authorized and instructed to issue to said Raymond L. Donnell one thousand dollars in cash and nineteen hundred shares of the capital stock of this company in full payment for his entire interest in the publication known as the 'Railway News.'"

No action was taken pursuant to the resolution prior to January 1, 1900, nor did the corporation transact any other business prior to that time.

*Held*, that a *de facto* corporation did not exist prior to January 1, 1900, and that a director of the corporation could not be held liable for a debt thereof because of the failure to file an annual report in January, 1900.

*EMERY v. DE PEYSTER*..... 65

2. — *Execution of a contract by a corporation — when proof of the signatures thereto of its president and secretary and of the affixing of the corporate seal is insufficient.*] While, as a general rule, evidence that a contract, purporting to have been made on behalf of a corporation, was signed by the president and secretary of the corporation and bears the corporate seal, is



**CORPORATION** — *Continued.*

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sufficient *prima facie* to authorize its admission in evidence, yet where it affirmatively appears, when the contract is first offered in evidence, that the seal was affixed, not by the authority of the board of directors of the corporation, but by the authority and at the request of its president, and that after execution the contract, or a duplicate thereof, was kept in a safe to which only the secretary and treasurer had access, the general rule does not apply and further proof must be given to the effect that the president was authorized by the board of directors to direct that the seal be affixed.

QUACKENBOSCH v. GLOBE & R. FIRE INS. CO. .... 168

— Contract between stockholders of a bank and a third person for the sale to the latter of stock in the bank and his election and continuance for five years as cashier — a complaint alleging a breach thereof is not demurrable, although the contract required the cashier to use his influence "towards retaining the services of the present board of directors." BONTA v. GRIDLEY. 33

See CONTRACT.

— Insolvent savings and loan association — borrowing shareholders relieved from their contracts as of the date of the appointment of the receivers — approximate value of a shareholder's stock, to be applied in reduction of a mortgage given by him. RIGGS v. CARTER. .... 590

See SAVINGS AND LOAN ASSOCIATION.

— Pleading — allegation as to liability imposed by the laws of another State for pretending to be officers of a pretended corporation — when it is contractual and not penal — liability at common law.

WORTHINGTON v. GRIESSER. .... 203

See PLEADING.

— Accounting by receivers of moneyed corporations — chapter 60 of the Laws of 1902 is applicable to receiverships created prior to its passage.

PEOPLE v. MANHATTAN FIRE INS. CO. .... 517

See RECEIVER.

— Service of a summons — a person who collects the dues of members of a fraternal insurance association is not a managing agent.

MOORE v. MONUMENTAL MUT. LIFE INS. CO. .... 209

See PROCESS.

— Contract not within the scope of a corporation's business — it must be authorized by the board of directors. LEARY v. ALBANY BREWING CO. .... 6

See PRINCIPAL AND AGENT.

— Action to restrain a corporation from adopting a firm name in its corporate title. FISK v. FISK, CLARK & FLAGG. .... 83

See PARTNERSHIP.

— The invalidity of devices to charitable corporations must be pleaded.

GARVEY v. U. S. FIDELITY & GUARANTY CO. .... 391

See WILL.

— Tax — what is not "doing business" in the State of New York.

PEOPLE EX REL. DIVES-PELICAN CO. v. FEITNER. .... 189

See TAX.

**COSTS** — *Liability therefor, of a judgment creditor who secures the appointment of a receiver of his debtor's property and requests the receiver to bring an action to recover it, in which a judgment for costs is recovered against him.*

1. A judgment creditor, at whose instance a receiver of the property of the judgment debtor had been appointed in proceedings supplementary to execution, requested the receiver to commence an action to recover property alleged to belong to the judgment debtor. The receiver brought the action in the Supreme Court and recovered judgment at the trial. The defendants took an appeal to the Appellate Division, which resulted in the reversal of the judgment. The receiver then, in good faith, took an appeal to the Court of Appeals where the judgment of the Appellate Division was affirmed.

Upon a motion by the defendants in the action, under section 3247 of the Code of Civil Procedure, to compel the judgment creditor to pay the costs of the action, it was

*Held*, that as it appeared that the judgment creditor knew of the pendency of the action and took no steps to discontinue it, it could not be said that

**COSTS—Continued.**

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the receiver's action in defending the appeal to the Appellate Division and in taking the appeal to the Court of Appeals was unwarranted and that the judgment creditor was thereby relieved from liability for the costs of the appeals. *DROEGE v. BAXTER*..... 78

2. — *Security for costs—cannot be required of the committee of an incompetent in an action against him.*] The express permission given to the court in section 8271 of the Code of Civil Procedure, to require security for costs to be given in an action brought by the committee of an incompetent, is an implied denial of the right to require the giving of such security in an action brought against such a committee. *KELLY v. KELLY*..... 519

8. — *Additional allowance of costs—an action to recover for personal injuries in a collision at a railroad crossing is not extraordinary.*] An action to recover damages for personal injuries, sustained in a collision at a railroad crossing, may be difficult, but cannot be said to be extraordinary, and, consequently, an extra allowance of costs cannot be granted in such an action. (Code Civ. Proc. § 8258.) *SMITH v. LEHIGH VALLEY R. R. Co.* (No. 2).... 47

— When they should not be imposed as a condition of granting a new trial. *COHEN v. KRULEWITCH*..... 126  
See *NEW TRIAL*.

— Taxable costs as a measure of an attorney's compensation.  
*BOWERY BANK v. HART*..... 121  
See *MORTGAGE*.

**COUNTERCLAIM:**

See *SET-OFF*.

**COUNTY** — *Unauthorized publication of abstracts of town and county accounts.*] 1. Section 51 of the County Law (Laws of 1892, chap. 686) and section 170 of the Town Law (Laws of 1890, chap. 569), relative to the publication of the abstracts of town and county accounts, contemplate that all the abstracts shall be grouped together in a single publication.  
*ROGERS v. BOARD OF SUPERVISORS*..... 501

2. — *Payment therefor restrained.*] The practice of publishing portions of the town abstracts in different newspapers throughout the county is unauthorized, and a taxpayer of the county is entitled to an injunction restraining the payment of bills incurred for such publications. *Id.*

8. — *Good faith no defense.*] The fact that the publications were made in good faith and in accordance with a custom which had been established in the county does not entitle the newspaper publishers to receive payment therefor, as they are bound to know the limitations imposed upon the powers of the county officials. *Id.*

**COURT** — *Rule 49, General Rules of Practice—purchaser under a judgment in partition—relieved from his purchase where guardians ad litem for infant defendants were connected in business with the attorneys for adverse parties—who is an "adverse party."*  
See *PARISH v. PARISH*..... 267

— *Rule 5 of the Rules for the Regulation of Trial Terms in the First Department—a reasonable doubt whether a case can be tried within two hours is a sufficient ground for not putting it on the short cause calendar.*  
See *UVALDE ASPHALT PAVING Co. v. DUNN*..... 467

— *Salvage—an action for, does not lie in a State court—a State court has jurisdiction where services have been rendered to a stranded barge under a contract.*  
See *MERRITT & CHAPMAN DERRICK & W. Co. v. TICE*..... 826

— *Judicial notice as to the time of sunrise and sunset.*  
See *MONTENES v. METROPOLITAN STREET R. Co.*..... 498

**CREDITOR:**

See *DEBTOR AND CREDITOR*.

**CRIME — Abduction — what evidence is not corroborative.]** 1. Upon the trial of an indictment charging the defendant with the crime of abduction, under subdivision 1 of section 263 of the Penal Code, the complainant and a companion gave testimony which, if credited, established that the defendant committed the crime while the complainant and her companion were in his rooms on Sunday morning, April 27, 1892. The People, for the purpose of corroborating the testimony of the complainant, produced a physician, who testified that he examined the person of the complainant, and that, as a result of such examination, he was able to say that she had had sexual intercourse previous thereto, but that he was unable to state whether it was prior or subsequent to April 27, 1892. No evidence was given as to the whereabouts of the complainant during the interval between April 27, 1892, and the examination, and she testified that she had led an immoral life for several years prior to April 27, 1892.

*Held*, that the testimony of the physician did not corroborate that of the complainant in the slightest degree, and that it was error for the court to receive such testimony.

The complainant further testified, and was corroborated in some respects by her companion, that after the commission of the crime the defendant went with the complainant and her companion to a dry goods store and there made certain purchases for them. To corroborate this testimony, the People produced a saleswoman employed in the store, and she testified that upon a Sunday morning — she was unable to state the month or day of the month — two girls came to the store with a young man, who purchased certain articles for them, and that she recognized complainant's companion as one of the girls. She did not identify the defendant as the man who accompanied the girls, nor did she describe such man.

*Held*, that the evidence of the saleswoman was not corroborative of the testimony of the complainant or her companion, and that it was error for the court to refuse to strike it out.

Corroborative evidence, whether consisting of acts or admissions, must be of such a character as tends to prove to some extent the guilt of the accused by connecting him with the crime charged in the indictment.

PEOPLE v. SWABEY..... 185

2. — *Conviction for vagrancy in the boroughs of Manhattan and the Bronx — constitutionality of the provisions for the prisoner's earlier discharge in case of his not having been previously convicted.]* Sections 707-712 of the Greater New York charter, as amended by chapter 466 of the Laws of 1901, provide that persons convicted of vagrancy in the boroughs of Manhattan and the Bronx shall be sentenced to the workhouse on Blackwell's Island for a term of six months, but that if it is the prisoner's first offense within a period of two years the commissioner of correction shall make an order directing that he be discharged at the expiration of five days; that if it is his second offense within that time he shall be discharged at the expiration of twenty days, and that if he shall have been previously convicted two or more times within that period the order shall direct his discharge "at the expiration of a period equal to twice the term of his detention under the last previous commitment, but not in any event exceeding the period fixed by the warrant of commitment."

The sections further provide that the prisoner may, if he so desires, obtain a hearing before a magistrate upon the question whether he has been previously convicted, and also that no prisoner committed upon conviction of vagrancy shall be discharged before the period fixed by the warrant of commitment without the written consent of the magistrate who committed him.

*Held*, that such sections are constitutional.

PEOPLE EX REL. ABRAMS v. FOX..... 245

3. — *Perjury — section 96 of the Penal Code is not limited to affidavits required by the laws of the State of New York.]* Section 96 of the Penal Code, which provides: "A person who swears \* \* \* that any \* \* \* affidavit \* \* \* by him subscribed is true \* \* \* on any occasion in which an oath is required by law \* \* \* or may lawfully be administered, and who \* \* \* on such \* \* \* occasion wilfully and knowingly \* \* \* deposes \* \* \* falsely in any material matter, or states

**CRIME** — *Continued.*

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in his \* \* \* affidavit \* \* \* any material matter to be true which he knows to be false, is guilty of perjury," is not limited in its operation to affidavits and oaths required by the laws of the State of New York, but extends to an oath or affidavit required by the laws of a sister State and authorized by the laws of such sister State to be taken in the State of New York. *PEOPLE v. MARTIN* ..... 896

4. — *Indictment charging two persons with the crime of perjury, and also that one of them counseled the acts of the other — it charges both as principals with the commission of one offense.* [An indictment charging two persons with the crime of perjury, which first avers the commission of the offense by both persons, and then avers that one of them was actually present, aiding, counseling, advising and procuring the said acts, oaths and willful purposes of the other, does not allege the commission of two offenses, but simply the commission of a single offense in which both the defendants were principals. *Id.*

**DAMAGES** — *Occurrences since an action was begun may be set up as a partial defense in mitigation of damages — such defense is not limited to actions to recover damages for breach of promise to marry, or for personal injury or injury to property.*

*See GABAY v. DOANE* ..... 418

— *Right of a lessee to recover damages occasioned by an elevated railroad constructed with the assent of the lessor — effect of the lessee holding under a renewal provided for in the original lease.*

*See STORMS v. MANHATTAN R. CO.* ..... 94

— *Contract for the improvement of the Erie canal under the act of 1895 — abandonment of the work by the State — right of the contractors to recover damages for the breach.*

*See BAKER v. STATE OF NEW YORK* ..... 528

— *Libel — verdict of \$40,000 reduced to \$25,000 — exemplary damages, when proper.*

*See CRANE v. BENNETT.* ..... 102

— *Provocation — considered in reduction of actual as well as of punitive damages.*

*See GENUNG v. BALDWIN* ..... 584

— *The cost of store fixtures as evidence of value.*

*See PERLBERGER v. GRELL* ..... 128

**DE FACTO CORPORATION:**

*See CORPORATION.*

**DEATH** — *Abatement of action by.*

*See ABATEMENT AND REVIVOR.*

**DEBTOR AND CREDITOR** — *Insolvent savings and loan association — borrowing shareholders relieved from their contracts as of the date of the appointment of the receivers — approximate value of a shareholder's stock, to be applied in reduction of a mortgage given by him.*

*See RIGGS v. CARTER.* ..... 580

— *Costs — liability therefor, of a judgment creditor who secures the appointment of a receiver of his debtor's property and requests the receiver to bring an action to recover it, in which a judgment for costs is recovered against him.*

*See DROEGE v. BAXTER.* ..... 78

— *Transfer by a bankrupt — what must be shown to establish that it was fraudulent as to creditors.*

*See BENEDICT v. DESHEL.* ..... 276

— *Liability of a director of a corporation for its debts.*

*See CORPORATION.*

**DECLARATION** — *When competent as evidence.*

*See EVIDENCE.*

## DECREE:

See JUDGMENT.

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**DEED** — *Action to restrain the construction of a street railroad by an abutting owner — description in a deed — proof as to the title to the fee of a highway.*

1. Upon the trial of an action brought by the owner of property abutting upon the east side of Freeport road in the town of Hempstead, Nassau county, to enjoin the construction and maintenance of a street surface railroad upon the easterly half of the highway in front of his premises, it appeared that the plaintiff's title was derived under a deed executed in 1893 by Laura A. Duryea and her husband. This deed contained the following description: "Beginning at a point on the North Easterly side of the Babylon Turnpike (so called) at a point intersecting the land of J. Tompkins;" thence by various courses and distances "until it comes to the North easterly side of the Babylon Turnpike (so called); thence along said Turnpike North forty-five degrees, forty-one minutes West one thousand one hundred and fifty-nine feet; thence along said Turnpike North forty-six degrees, forty-nine minutes West one hundred and thirty and three tenths feet; thence still along said Turnpike North fifty-four degrees three minutes West three hundred and sixty-two and three tenths feet to the point or place of beginning. Containing within said bounds twenty-three 8612/10000 acres of land be the same more or less. Together with all the rights of the Grantor in and to said Babylon Turnpike," etc.

Mrs. Duryea's title was derived under deeds from Joseph S. Morrell and Joseph E. Tompkins.

The Morrell deed, which was executed in 1878, described the land as "lying on the easterly side of the Highway" and bounded "Westerly by said Turnpike Road." It also described the premises as follows: "Beginning at the Southwesterly corner thereof on the easterly side of the Highway formerly known as the South Oyster Bay Turnpike Road adjoining land of Joseph E. Tompkins and at a locust stake driven in the ground, and running thence along said Highway South fifty-five degrees and twenty-five minutes East three hundred and twenty feet and three tenths of a foot; thence still along said highway South forty-seven degrees and forty-five minutes East, one hundred and thirty feet and three tenths of a foot; thence still along said highway," etc.

The Tompkins deed, which was executed in 1874, described the premises as follows: "All that certain piece or parcel of land situated near the Village of Hempstead and in the Town of Hempstead aforesaid and on the Northerly side of the old Babylon Turnpike, and bounded as follows, viz.: Beginning at a locust stake and running along the Northerly side of the Babylon Turnpike," etc.

It was not shown that Mrs. Duryea's grantors ever had any title to the highway or any reserved right therein, but it appeared that the amount of land included in the description, according to lines and courses, contained in the deed from Mrs. Duryea to the plaintiff corresponded with the amount stated in the deed, while if the eastern half of the highway was included, the acreage would exceed that named in the deed by one and fourteen one-hundredths acres.

Held, that neither the deeds to Mrs. Duryea nor the deed from the latter to the plaintiff conveyed the easterly half of the highway, and that the complaint was properly dismissed.

KENNEDY v. MINEOLA, H. & F. TRACTION Co. .... 484

2. — *Grant by the Deputy Governor of the colony of New York to an individual of land bounded on a street — when the title passes to the center line of the street.* The patent granted November 9, 1670, by Francis Lovelace, Deputy-Governor of the colony of New York, to Pieter Jacobs Borsboom of a lot in the city of Schenectady, which described the premises as follows. "a Certain Lott of Ground at Schanecktade belonging to Pieter Jacobs Borsboom & now in his Tenure or occupation, lying in a Square of Two hundred foot wood measure at Eleaven Inches ye foot, abutting on ye East Syde on Benjanyn Roberts, on ye South syde on William Tellers, and on ye West & north sydes on ye highway," conveyed to the patentee the title to the center of the highway referred to in the patent.

PAIGE v. SCHENECTADY RAILWAY Co. .... 571

**DEFINITION** — "*As appurtenant*" — land set off in a partition suit "*as appurtenant*" to each of two other lots — rights of the owners of such two lots therein.

See *PUTNAM v. PUTNAM*..... 554

— "*Party*," in the *Code of Civil Procedure*, § 984, defined.

See *LANE v. BOCHLOWITZ*..... 171

**DEMAND NOTE:**

See *BILLS AND NOTES*.

**DEMURRER:**

See *PLEADING*.

**DENIAL:**

See *PLEADING*.

**DEPOSIT** — *In banks*.

See *BANKING*.

**DEPOSITION** — Services of a commissioner of deeds, employed by the city of New York, who takes affidavits to accounts of employees of the city — when he is not entitled to compensation, beyond his salary, from the city.

*BENJAMIN v. CITY OF NEW YORK*..... 62

See *MUNICIPAL CORPORATION*.

— Services of a commissioner of deeds, employed by the city of New York, in taking affidavits of city inspectors — a waiver of the right to compensation may be established by implication.

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See *MUNICIPAL CORPORATION*.

**DISCHARGE** — *From arrest*.

See *ARREST*.

— *In bankruptcy*.

See *BANKRUPTCY*.

**DISCRETIONARY POWER** — *Of a court*.

See *PRACTICE*.

**DOCK:**

See *WHARF*.

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**EDUCATION:**

See *SCHOOL*.

**ELECTION** — *Action against both an agent and his undisclosed principal — when the plaintiff must elect which he will hold liable.*

See *TEW v. WOLFBOHN*..... 454

— *To treat the whole principal sum secured by a mortgage as due.*

See *MORTGAGE*.

**ELEVATED RAILROAD** — *Condemnation of the right of a lessee.*

See *EMINENT DOMAIN*.

**EMINENT DOMAIN** — *Lease — right of a lessee to recover damages occasioned by an elevated railroad constructed with the assent of the lessor — effect of the lessee holding under a renewal provided for in the original lease — form of conveyance of easements to which the elevated railroad company is entitled on paying the damages — violation of a covenant against an assignment of a lease.]*

1. May 1, 1872, the city of New York demised certain premises to Francis J. Leggett for a period of twenty-one years by a lease containing a covenant for a renewal upon terms to be agreed upon by the parties or determined by appraisers or by an umpire. In 1875 the city of New York consented to the construction and operation of an elevated railroad in front of the property. The construction of the road was commenced in 1878 and it was put in operation in 1879. Upon the expiration of the lease, which, by mesne assign-

**EMINENT DOMAIN** — *Continued.*

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ments, had passed to Frances Storms, who also owned a building erected upon the demised premises, a renewal lease for twenty-one years was executed to her.

In an action subsequently brought by Frances Storms and Alfred Storms, who, by assignment from Frances Storms, had acquired an interest in the lease, against the elevated railroad company, to recover damages for the impairment of the easements appurtenant to the leasehold property, it was

*Held*, in view of the plaintiffs' ownership of the building erected upon the demised premises and of the covenant of renewal contained in the lease, that such renewal lease did not involve the creation of a new tenancy, but only the continuance of the existing tenancy and that, consequently, the fact that such renewal was executed after the city had consented to the construction and operation of the railroad and such operation had actually begun, did not deprive the plaintiffs of the right to maintain the action:

That it could not be successfully urged that the plaintiffs had suffered no damage from the operation of the road since the renewal of the lease, upon the theory that the rent reserved in the renewal was fixed with reference to the existence of the elevated railroad in front of the premises, for the reason that the injury inflicted upon the lot, apart from the building, was the only element which could be considered in fixing such rent, and also because the lessees' ownership of the building obliged them to accept the renewal lease upon the best terms they could obtain;

That the fact that an interest in the renewal lease had been assigned to the plaintiff Alfred Storms, without the consent of the city, as required by a covenant contained in the original lease, did not prevent a recovery by the plaintiffs, for the reasons that the city had consented to several assignments of the lease before the assignment to Alfred Storms, and that the defendants, being trespassers, were not entitled to take advantage of the covenant;

That the defendants, upon paying the damages awarded by the court, were entitled to receive a complete title to the easements which the plaintiffs claimed were appurtenant to the demised premises under the then existing or any subsequent renewal under the terms of the lease, and not simply a conveyance of the right to operate the railroad until the expiration of the then present renewal lease. *STORMS v. MANHATTAN R. CO.* ..... 94

2. — *Effect of a consent to one assignment.*] *Seem*, that under a lease containing a covenant against assignments without the consent of the landlord, if the landlord gives a consent to one assignment, the covenant against assignments is satisfied and subsequent assignments may be made without his consent. *Id.*

3. — *Commission to condemn land in New York city — the clerks thereof are to be furnished by the corporation counsel.*] Section 1 of chapter 393 of the Laws of 1896, making it the duty of the corporation counsel of the city of New York to furnish the necessary clerks to commissioners appointed in condemnation proceedings instituted on behalf of the city, was not repealed, either expressly or impliedly, by the Greater New York charter (Laws of 1897, chap. 378) and is still in force. Consequently, commissioners of estimate and assessment appointed in a proceeding instituted by the city of New York to acquire title to certain lands for the construction of East River Bridge No. 4 had no power to appoint a clerk to perform the clerical work of the commission, and a clerk so appointed by them is not entitled to enforce payment of his fees from the city.

*MATTER OF BOARD OF PUBLIC IMPROVEMENTS* ..... 351

**EMPLOYER AND EMPLOYEE:**

*See* MASTER AND SERVANT.

**EQUITY** — Life insurance — action by the insured to reform the policy and to recover its surrender value as reformed — he acts as trustee for the beneficiary — right of an assignee of the beneficiary, after the death of the insured, to be substituted as plaintiff and to serve a supplemental complaint asking for the reformation of the policy and the recovery of the amount thereby secured to be paid. *HUNT v. PROVIDENT SAVINGS LIFE ASSUR. SOC.* ..... 338

*See* INSURANCE.

— Statement of a cause of action in equity. *LEGGETT v. STEVENS* ..... 612

*See* PLEADING.

**ERIE CANAL** — *Improvement of the Erie canal under the act of 1895 — it was abandoned, not suspended — the State was not authorized by the contracts to abandon it — right of the contractors to recover damages for the breach.*  
*See BAKER v. STATE OF NEW YORK.* ..... 528

**EVIDENCE** — *Trial — proof proper on the direct case is admissible in rebuttal only in the discretion of the court — an issue as to the ownership of a mortgage does not admit of proof that an assignment by the alleged owner was only as collateral to a debt since paid.* 1. The heirs at law of one Selena Barson, who had died intestate seized of certain real estate, brought an action in ejectment against Agnes K. Mulligan and William G. Mulligan, husband and wife, who were in possession of the premises. The answer alleged that Mrs. Mulligan was, prior to October 1, 1897, and at all times thereafter had been, the owner and holder by certain mesne assignments of a mortgage upon the premises executed by Selena Barson October 1, 1853. Upon the trial the defendants proved the execution of the mortgage; that the defendant Agnes K. Mulligan had, by mesne assignments, acquired the same on June 28, 1888, and then rested.

The plaintiffs then proved in rebuttal that on July 6, 1888, the defendant Agnes K. Mulligan assigned the mortgage to one Steers and rested.

The defendants then attempted to prove by parol evidence that the assignment to Steers, while absolute in form, was really given as collateral security for the payment of a loan; that the loan had been paid and the mortgage formally reassigned to the defendant Agnes K. Mulligan.

*Held*, that the refusal of the court to allow the defendants to prove such facts was not erroneous for the following reasons: *First*, that under the terms of the answer the defendants were not entitled to prove by parol evidence that an assignment, absolute upon its face, was in fact only given as collateral security for the payment of a loan; *second*, because at the time such evidence was offered it was discretionary with the court whether or not to receive it.

Upon a trial a party is bound to produce all his evidence before he closes his side of the case, and after he has closed his case and rested, it is within the discretion of the court whether or not to allow a reopening of the case to supply omissions or to receive further testimony. **BARSON v. MULLIGAN.** 192

2. — *Testimony given on another trial used by the party calling a witness to discredit him as to matter called out by the adverse party — striking out competent evidence — not a ground of reversal unless the evidence was beneficial to the party complaining thereof.* In an action brought to recover damages for personal injuries sustained by the plaintiff while riding a bicycle upon a city street, in consequence of his being struck by a horse and wagon owned by the defendant, one of the questions litigated upon the trial was whether the defendant's driver was whipping the horse at the time of the accident. The plaintiff called the driver as a witness and examined him concerning certain details of the accident, but did not examine him as to whether or not he was whipping the horse. Upon cross-examination by the defendant, the driver testified that he did not have a whip in his hand. He was then cross-examined by the plaintiff's counsel upon this point and, for the purpose of discrediting him upon such point and upon other points about which the defendant had questioned him and which had not been touched upon by the plaintiff, the court permitted the plaintiff to read in evidence the testimony given by the witness on a former trial.

*Held*, that the ruling was proper;

That, as the defendant had cross-examined the witness with respect to a matter independent of the direct examination and which was part of the defendant's affirmative defense, it was competent for the plaintiff to cross-examine the witness, as to the matter developed by the defendant, in the same manner as if the witness had been called by the defendant.

The action of a trial judge in striking out, upon the motion of the party producing it, competent evidence, lawfully in the case, does not constitute reversible error, unless it appears that the evidence is in some way beneficial to the other party and that he will be prejudiced by its exclusion.

**HUBNER v. METROPOLITAN STREET R. CO.** ..... 290

3. — *Transfer of a stock certificate after the announcement of a decision and before entry of judgment for its recovery against the transferor — when*



**EVIDENCE — Continued.**

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*such judgment is admissible against the transferee — effect thereof.*] In an action brought by a corporation against May Thorne Brantingham and Laura B. Washburn for the purpose of determining which one of said defendants was entitled to a certificate of stock of the plaintiff corporation, it appeared that, in a prior action brought by the defendant Brantingham against one Huff, it was adjudged that the certificate belonged to Brantingham; that after the announcement of the decision in that action and before judgment had been entered thereon Huff assigned the certificate to the defendant Washburn.

*Held*, that the defendant Washburn's right to the certificate of stock depended upon whether she took it in good faith, without notice of any infirmity in the title and for value;

That, as it appeared that the defendant Washburn testified as a witness in the action between Brantingham and Huff and had knowledge of the issues involved therein, the judgment roll in that action was properly received in evidence in the present action as bearing upon the question of her good faith in acquiring the stock and whether she then knew that there was any infirmity in her assignor's title;

That such judgment roll was *prima facie* sufficient, taken in connection with the other facts, to show that she had notice of the infirmity in her assignor's title to the certificate and that it was incumbent upon her to show that such certificate was acquired by her in good faith and for value.

PRINTING TEL. NEWS CO. v. BRANTINGHAM. .... 280

4. — *Witness — right of, to explain testimony previously given by him — when it does not involve a personal transaction with a decedent — form of question.*] In an action brought by an heir at law of an intestate to partition property of which the intestate died seized, one of the defendants, a son of the intestate, alleged that he and his father had been copartners, and that the real property in question was a part of the copartnership property.

Upon the trial it appeared that in a prior action brought to foreclose a mechanic's lien against the property both the intestate and his son were witnesses, and that the son testified that the premises belonged to his father, and that he was working for him. The son was thereupon placed upon the stand, and after his attention had been directed to the testimony given by him in the former action he was asked if he had "anything to say in explanation of that evidence." The question was excluded upon the ground that, as the intestate was present in court at the time the testimony in question was given, the witness was disqualified by section 839 of the Code of Civil Procedure from giving any explanation thereof.

*Held*, that the exclusion of the explanatory evidence was erroneous, as the testimony given by the witness on the former trial involved no communication between the witness and his father, and also because it is a general principle of evidence that when the preceding testimony of a witness has been received in evidence it is always subject to explanation by him;

That the fact that the witness' counsel did not indicate the character of his proposed explanation did not warrant the exclusion of the evidence.

STIRLING v. KELLEY. .... 631

5. — *An unanswered letter, written by the assignor of a claim for the use of a cottage and stable, stating the claim, is not competent proof in an action by the assignee to recover the amount due from the debtor — effect of a failure to answer it.*] In an action brought against the executrix of a decedent to recover upon a contract made by the plaintiff's assignor with the decedent, by which the latter was alleged to have engaged a cottage and stable from the plaintiff's assignor for a period of five months, a letter written by the plaintiff's assignor to the decedent's daughter, who afterwards qualified as his executrix, stating, "As you have transacted most of the business with me, I am addressing you on the subject of my claim against your father's estate. My engagement with your family was for the season, and a long one, as you would not agree to my taking this cottage till the landlord said we might have it through October, saying the Autumn was the most pleasant time here. This long term justified me in taking such a responsibility, and now I have it on my hands," which letter was not answered, is not competent evidence in support of the plaintiff's claim. The failure to answer such letter was not an admission of the facts stated therein.

HEALY v. MALCOLM. .... 69

**EVIDENCE — Continued.**

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6. — *Compensation of a physician — what question in regard thereto, although objectionable, does not require a reversal.*] A question propounded upon the trial of an action to recover damages for personal injuries, as to what would be the reasonable and fair compensation of a physician "for professional consultation of even the most ordinary kind for the period of seven months, consultations having been had at two or three times a week during that period," is objectionable, but the answer, "about two dollars a visit," being competent, and the question not harming the defendant, it is not ground for reversal. *MULLER v. METROPOLITAN STREET R. Co.* ..... 221

7. — *Evidence sufficient to establish that a particular injury was caused by the accident.*] What evidence given on the trial of such an action is sufficient to warrant a finding that a hernia from which the plaintiff was suffering at the time of the trial was caused by the accident, considered. *Id.*

8. — *Proof of statements made in the presence of a party seriously injured — the injured party must be shown to have been cognizant of what was said.*] In an action to recover damages for personal injuries, a hospital surgeon, who went to the plaintiff's house with an ambulance to take her to the hospital and found her lying upon a couch seriously injured and suffering from shock, but not unconscious, should not be allowed to testify to statements made in the plaintiff's presence concerning the manner in which the accident happened and to which the plaintiff made no reply, unless it appears that at the time such statement was made the plaintiff was cognizant of what was said and was in a condition to understand and appreciate it.

*SCHILLING v. UNION RAILWAY Co.* ..... 74

9. — *Judicial notice as to the time of sunrise and sunset.*] The court will take judicial notice of the time of the rising or setting of the sun on any given day, and may, where such question is material, consult the almanac, not strictly as evidence, but for the purpose of refreshing the memory of the court and jury. *MONTENES v. METROPOLITAN STREET R. Co.* ..... 498

10. — *Transfer by a bankrupt — what must be shown to establish that it was fraudulent as to creditors.*] A bankrupt's intent to create a preference need not be proved by direct evidence, but may be established by facts and circumstances from which it can be found that such intent existed at the time the transfer was made. *BENEDICT v. DESHEL.* ..... 276

11. — *Provocation — considered in reduction of actual as well as of punitive damages.*] In an action to recover damages for an assault and battery, evidence of provocation may be taken into consideration by the jury in reduction of actual or compensatory damages as well as in reduction of punitive damages. *GENUNG v. BALDWIN.* ..... 584

12. — *Proof required to establish a gift, by a person since deceased, against his estate.*] The rule that claims against the estate of a decedent must be established by clear and convincing proof applies with particular force where an attempt is made to establish an alleged gift by the decedent.

*ROBINSON v. CARPENTER.* ..... 520

13. — *Negligence of a city in the construction and maintenance of a sewer.*] What evidence is insufficient to warrant a finding that an overflow of a sewer was due to negligence in the construction of the sewer or in its subsequent maintenance, considered. *SUNDHEIMER v. CITY OF NEW YORK.* ..... 53

14. — *Construction in favor of validity.*] A construction which makes an instrument valid will be preferred to one which makes it invalid.

*UNION TRUST Co. v. OWEN.* ..... 60

15. — *Cost of store fixtures — value.*] The cost of store fixtures is competent evidence of their value. *PERLBERGER v. GRELL.* ..... 128

— *Libel — reckless publications — testimony of a magistrate who is the subject of the libel that evidence was insufficient to hold accused parties — letters written by him to the newspaper publishing the libel — his statement as to what part was and what was not true — an article appearing in another paper to affect the statements of a reporter thereof on the trial — copies of reports not admissible where the originals can be produced.*

*CRANE v. BENNETT.* ..... 102  
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— Complaint alleging a special contract for services — the plaintiff may under it recover on *quantum meruit* — allegation that services were worth a certain sum — admissibility of a contract as proof of their value — proof as to the value of services — competency of conversations with one of two receivers. *SHIRK v. BROOKFIELD*..... 295

*See RECEIVER.*

— Action to determine the validity of the probate of a will — testimony of physicians based upon a diagnosis of incipient paresis made by one of them three years before the testator's death and contradicted by his subsequent condition — it does not require the submission of the case to the jury.

*PHILIPS v. PHILIPS*..... 113

*See WILL.*

— A witness who, on the trial of an action for injury, testified as to the condition of a road, allowed on his cross-examination to state how long the road had been out of repair. *LITTEBRANT v. TOWN OF SIDNEY*..... 545

*See NEGLIGENCE.*

— Bill of lading — when the burden of proof as to when a loss of part of the goods covered by the bill occurred, rests on the carrier issuing it — conditions limiting the carrier's liability.

*FAY v. INTERNATIONAL NAVIGATION CO.*..... 469

*See SHIPPING.*

— Assignment of a lease by an uneducated client to his legal adviser — in an action by the client to set it aside the burden of showing that no unfair advantage was taken rests on the attorney. *SHEEHAN v. ERBE*..... 176

*See ATTORNEY AND CLIENT.*

— Negligence — injury because of a horse being frightened by a log by the roadside — testimony that the log was removed to prevent other horses being frightened is incompetent. *WHITE v. TOWN OF CAZENOVIA*..... 547

*See NEGLIGENCE.*

— A physician is incompetent to testify as to the cause of his patient's death — his certificate filed in the New York city health department is also incompetent. *ROBINSON v. SUPREME COMMANDERY*..... 215

*See INSURANCE.*

— Execution of a contract by a corporation — when proof of the signatures thereto of its president and secretary and of the affixing of the corporate seal is insufficient. *QUACKENBOSCH v. GLOBE & R. FIRE INS. CO.*..... 168

*See CORPORATION.*

— Although considered unreliable by the court, evidence must be submitted to the jury — proof as to a death having resulted from an accident.

*SHORTSLEEVE v. STERRINS*..... 588

*See NEGLIGENCE.*

— Oral notice of dishonor of a note — an allegation that it "was sent" is sufficient to authorize the admission of proof of such oral notice of dishonor.

*KELLY v. THEISS*..... 81

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— Mortgage to secure a note — when it does not require the payment of attorney's charges — an oral promise to pay them cannot be proved.

*BOWERY BANK v. HART*..... 121

*See MORTGAGE.*

— Will — proof required to admit it to probate, where the attorney who prepares it and attends to its execution is a beneficiary thereunder.

*MATTER OF RINTELEN*..... 143

*See WILL.*

— *De facto* corporation — what proof of its existence is insufficient to establish the liability of a director for its debts. *EMERY v. DE PEYSTER*.... 65

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— What declarations, made after an accident, are competent as part of the *res gesta*. *SCHEIR v. QUIRIN*..... 624

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- Agency — declarations of the agent as proof of.  
LEARY v. ALBANY BREWING CO. .... 6  
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- Abduction — what evidence is not corroborative.  
PEOPLE v. SWASEY. .... 185  
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- Proof of negligence and contributory negligence.  
See NEGLIGENCE.

**EXCEPTION — On a trial.**  
See TRIAL.

**EXCESSIVE DAMAGES :**  
See DAMAGES.

**EXECUTOR AND ADMINSTRATOR — Will — provision directing a sale — presumption, when it does not provide for taking back a bond and mortgage.]**  
A will, which directed the testamentary trustees to sell the testator's realty, was silent as to whether the sale should be made wholly for cash or partly on bond and mortgage.

*Held*, that the failure of the will to authorize a sale on bond and mortgage raised a presumption that it was the intention of the testator that the property should be sold for cash. SHRADY v. VAN KIRK. .... 261

— A decree of another State admitting a will to probate — duty of a claimant to assert rights in that State — a surety on an executor's bond cannot be sued until the executor is in default.

GARVEY v. U. S. FIDELITY & GUARANTY Co. .... 391  
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— When an executor has legal capacity to sue — interest of an executor's executor in the construction of the original testator's will.

LEGGETT v. STEVENS. .... 613  
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— Proof required to establish a gift, by a person since deceased, against his estate. ROBINSON v. CARPENTER. .... 520

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**EXEMPLARY DAMAGES :**  
See DAMAGES.

**FALSE REPRESENTATION — Action to recover upon a note given in part payment for land — false representations on the sale should be set up, if at all, by way of counterclaim or under a demand that the sale be rescinded.**

FARMERS' NAT. BANK v. ST. REGIS PAPER Co. .... 558  
See PLEADING.

**FELLOW-SERVANT — Who is not.**  
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**FIRE DEPARTMENT — In cities.**  
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**FIRM :**  
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**FORECLOSURE — Of lien.**  
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**FOREIGN LAW :**  
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MEYERS v. PENNSYLVANIA STEEL CO. . . . . 307

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TYRREL v. EMIGRANT INDUSTRIAL SAV. BANK. . . . . 131

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— Proof required to establish a gift, by a person since deceased, against his estate. ROBINSON v. CARPENTER. . . . . 520

*See* EXECUTOR AND ADMINISTRATOR.**GRADING** — *Of streets.**See* MUNICIPAL CORPORATION.**GRANT** — Patent granted by the Deputy Governor of the colony of New York to an individual of land bounded on a street — when the title passes to the center line of the street. PAIGE v. SCHENECTADY RAILWAY CO. . . . . 571*See* DEED.**GUARANTY** — *Where specifications attached to a building contract require the construction of a watertight flue the contractor does not guarantee the efficiency of the specifications to secure that result.**See* CONTRACT.— *Contract of, generally.**See* CONTRACT.**GUARDIAN AD LITEM:***See* INFANT.

**HABEAS CORPUS** — *The writ will not be issued where the applicant has been admitted to bail.] 1. A person, who has been arrested upon a criminal charge and has been admitted to bail, is not entitled to a writ of certiorari or of habeas corpus, under section 2015 of the Code of Civil Procedure, "for the purpose of inquiring into the cause of the imprisonment or restraint," as the imprisonment or restraint referred to in the section is an actual physical restraint by which the liberty of the individual is in some way restricted.*

PEOPLE EX REL. ALBERT v. POOL. . . . . 148

2. — *In case of his surrender by his bail it may issue.] If the relator should be surrendered by his bail and thus be actually in custody, he would be entitled to have the cause of his detention reviewed by such a writ of habeas corpus or of certiorari. Id.*

**HACK STAND** — *Cabs standing in front of hotels (not at hack stands) in the city of New York must pay a license fee of twenty-five dollars in addition to the three dollars license fee.*

*See* CITY OF NEW YORK v. REESING . . . . . 417

**HIGHWAY** — Patent granted by the Deputy Governor of the colony of New York to an individual of land bounded on a street — when the title passes to the center line of the street.

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— Proof as to the title to the fee of, in an action to restrain the construction of a railroad. *KENNEDY v. MINEOLA, H. & F. TRACTION Co.*..... 484  
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**HOTEL** — *Cabs standing in front of hotels (not at hack stands) in the city of New York must pay a license fee of twenty-five dollars in addition to the three dollars license fee.*  
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**HUSBAND AND WIFE** — *Contempt of court.*] 1. Proceedings in contempt are to be construed *stricti juris*; all the rights of the defendant must be carefully protected, and he cannot be adjudged guilty unless there has been a literal compliance with the law. *GOLDIE v. GOLDIE.* ..... 12

2. — *Proceedings to punish a husband for non-payment of alimony — notice must be given to him.*] The constitutional provision that no person shall be deprived of life, liberty or property without due process of law requires that, before a person can be punished by imprisonment for a contempt in disobeying an order, he must have had notice of it and an opportunity to be heard before a court clothed with authority to act and decide the questions involved. *Id.*

3. — *Service upon his attorney is insufficient — demand for alimony.*] Under title 3 of chapter 17 of the Code of Civil Procedure which, by the terms of section 1773 of that Code, governs contempt proceedings instituted for a failure to pay temporary alimony, it is necessary that a personal demand be made upon the defendant for the payment of the alimony, and that the order to show cause why he should not be punished for contempt be served upon him personally. Service of the order to show cause upon his attorney is not sufficient. *Id.*

— Transfer tax — an ante-nuptial transfer and a retransfer in trust held not to be subject thereto — the construction of the ante-nuptial transfer is not affected by a subsequent will. *MATTER OF MILLER.*..... 473  
*See TAX.*

— An assignment by a husband of a policy of insurance issued on his life for his wife's benefit is a consent to the wife's assignment thereof.  
*SHERMAN v. ALLISON.*..... 49  
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*See INSANE.*

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**IMPRISONMENT** — *In civil actions.*  
*See ARREST.*

**INCOMPETENT:**  
*See INSANE.*

**INDICTMENT** — *Charging two persons with the crime of perjury, and also that one of them counseled the acts of the other — it charges both as principals with the commission of one offense.*  
*See PEOPLE v. MARTIN.*..... 396

**INFANT** — *Suit by an infant in forma pauperis — pecuniary ability of the guardian.*] Where an action is brought by an infant through a guardian *ad litem*, the infant will not be denied leave to prosecute the action as a poor person simply because the guardian *ad litem* is possessed of sufficient means to pay the expenses of the action unless it appears that such guardian *ad litem* is a parent of the infant. *MULLER v. BAMMANN.*..... 212

— Purchaser under a judgment in partition — relieved from his purchase where guardians *ad litem* for infant defendants were connected in business with the attorneys for adverse parties — who is an "adverse party."  
*PARISH v. PARISH.*..... 267  
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**INHERITANCE TAX:***See* TAX.

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**INJUNCTION** — *Temporary injunction granted to a taxpayer — when it will not be disturbed — unauthorized publication of abstracts of town and county accounts — payment therefor restrained — good faith no defense.*

*See* ROGERS v. BOARD OF SUPERVISORS..... 501

— *Action to restrain a corporation from adopting a firm name in its corporate title.*

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**INJURY:***See* NEGLIGENCE.

**INSANE** — *Security for costs — cannot be required of the committee of an incompetent in an action against him.* KELLY v. KELLY.... 519

*See* COSTS.**INSOLVENCY:***See* BANKRUPTCY.

**INSURANCE** — *Action by the insured to reform the policy and to recover its surrender value as reformed — he acts as trustee for the beneficiary — right of an assignee of the beneficiary, after the death of the insured, to be substituted as plaintiff and to serve a supplemental complaint asking for the reformation of the policy and the recovery of the amount thereby secured to be paid.]* 1. The complaint in an action brought by William Wilkinson against an insurance company alleged that, in 1891, the defendant issued an insurance policy to him, and represented that such policy provided for a fixed rate of premium, payable quarterly; that in December, 1898, the defendant sent the plaintiff a notice demanding payment of a much larger premium than he had theretofore paid; that the plaintiff had then reached the age of sixty-seven years, and that it was impossible for him to obtain insurance upon his life in any reputable insurance company, except at a greatly increased rate of premium.

The relief demanded was that the policy of insurance should be reformed, if it should be determined that the defendant was, by its terms, entitled to demand payment of premiums at an increasing rate, or that the policy be construed to be a level rate policy, not subject to an increasing premium; that the defendant be required to accept the premium at the level rate, as paid when the policy was first issued, for the remainder of the life of the insured; that the plaintiff recover the value of the policy as reformed, and that he have such other and further relief as to the court might seem just and equitable.

The policy in question designated Wilkinson's three sons as the beneficiaries thereof, and, at the time the action was brought, such beneficiaries had assigned all their interest in it to Rebecca Wilkinson. After the defendant had answered and the case was ready for trial, Wilkinson died. His wife, Rebecca Wilkinson, filed with the defendant proof of the death of the insured, and subsequently assigned to one John E. Hunt all of her claim under the policy of insurance and all her right, title and interest in the cause of action then pending. Thereupon Hunt made a motion for an order reviving the action and substituting him as plaintiff in the place and stead of said Wilkinson, and also for leave to serve a supplemental complaint setting up the facts in relation to Wilkinson's death and the assignment to him of the cause of action, and asking therein for judgment that the policy be declared to be a level rate policy according to its terms, and that the plaintiff recover judgment thereon for the sum of \$10,000, which was the whole amount secured to be paid thereby in the event of Wilkinson's death.

*Held*, that Wilkinson stood, in relation to his wife, as the trustee of an express trust, within the provisions of section 449 of the Code of Civil Procedure, and that, as such, the action was properly brought in his name;

That Hunt, having succeeded to the entire claim by virtue of his assignment, was entitled to be substituted as the party plaintiff either under section 756 or section 757 of the Code of Civil Procedure;

That Hunt should be permitted to serve the supplemental complaint;

**INSURANCE—Continued.**

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That the fact that such complaint demanded a reformation of the policy and also sought to recover the sum secured to be paid thereby did not render it objectionable;

That it could not be successfully urged, because the money judgment demanded by the proposed supplemental complaint was the amount secured to be paid by the policy in the event of Wilkinson's death, while the money judgment demanded in the original complaint was only for the surrender value of the policy, that the purpose of the proposed supplemental complaint was to set up a new and totally different cause of action from that averred in the original complaint;

That the cause of action under both complaints remained the same and that the extent of recovery was alone modified.

HUNT v. PROVIDENT SAVINGS LIFE ASSUR. SOC..... 388

2. — *Question as to other insurance "in what company?"—answer stating only one company when the applicant was insured in two.*] An application for membership in an assessment beneficiary order contained a number of questions and answers, among which was the following: "5. A. Is there now any insurance on your life? Yes. B. If so, in what company and for what amount? Temples of Liberty; \$1,000."

At the end of the questions and answers was a printed clause to the effect that the applicant agreed "that if there be, in any of the answers herein made, any untrue or evasive statements, misrepresentations or concealment of facts, \* \* \* then all claims on the Benefit Fund \* \* \* shall be forfeited and lost by me."

At the time the application was made the applicant was insured in the Prudential Insurance Company of New Jersey for the sum of \$158.

*Held*, that if the insured intentionally concealed the fact that he was insured in the Prudential Insurance Company, such concealment would not constitute a breach of warranty, but would furnish a basis for avoiding the contract on the ground of fraud;

That, as the language of the question was in the singular, the applicant might well understand that the beneficiary order simply desired him to specify one other organization or company in which he was insured, and that it could not be said, as matter of law, that his failure to disclose his insurance in the Prudential Company was a fraudulent concealment of facts.

ROBINSON v. SUPREME COMMANDERY..... 215

3. — *A physician is incompetent to testify as to the cause of his patient's death.*] Where, in an action upon a beneficiary certificate of life insurance, it is alleged as a defense that the insured made a false representation as to the cause of his father's death, the physician who attended the insured's father during his last illness is incompetent, under section 884 of the Code of Civil Procedure, to testify on behalf of the defendant, an assessment beneficiary order, as to the cause of his patient's death. *Id.*

4. — *His certificate filed in the New York city health department is also incompetent.*] The death certificate made by such attending physician and filed, pursuant to law, with the health department of the city of New York, is not admissible to prove the cause of death, notwithstanding the provision of section 955 of the Code of Civil Procedure, which provides that official records which have remained on file in certain public offices, including the health department of the city of New York, for a period of twenty years "shall be presumptive evidence of their contents, and shall be receivable in evidence as such upon any trial in any of the courts of this State in any controversy pending therein between any parties." *Id.*

5. — *Marine insurance—when a "vessel is not lying between piers."*] A clause in a policy of marine insurance exempting the insurance company from liability for damages occasioned by ice, "except when the vessel is lying between piers," is designed to relieve the company from liability for damages thus occasioned except when the vessel is lying between two piers so contiguous to each other as to furnish shelter to both sides of the vessel; and if the vessel be injured by ice while lying at the south side of a pier, when the next pier southerly is nearly a half mile away, the insurance company is not liable for such injuries.

HUNTLEY v. PROVIDENCE WASH. INS. CO..... 196



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6. — *An assignment by a husband of a policy of insurance issued on his life for his wife's benefit is a consent to the wife's assignment thereof.*] Chapter 248 of the Laws of 1879, requiring the written consent of a husband to an assignment by his wife of a policy of insurance issued upon the husband's life for the benefit and use of the wife, is satisfied where the husband, contemporaneously with the assignment by the wife and as a part of the same transaction, executes a separate assignment of the policy to the assignee on the same sheet of paper which contains the assignment from the wife.

SHERMAN v. ALLISON..... 49

7. — *Payable to heirs at law — a child taken into the family is not included therein.*] A child, taken into a family and brought up therein as a child of the family without a formal adoption, is not entitled to share in the proceeds of an insurance policy issued upon the life of her foster father and payable to his heirs at law. MERCHANT v. WHITE..... 539

**INTERPLEADER :**

See PLEADING.

**ISSUE — Trial of.**

See TRIAL.

**JOINDER — Of parties.**

See PARTY.

**JUDGE'S CHARGE — To the jury.**

See TRIAL.

**JUDGMENT** — *Sale of real property after the making of an order canceling a judgment which is subsequently on appeal therefrom sustained in part — the purchaser acquires a title free therefrom.*] In an action to enforce the statutory remedies for the mismanagement of a corporation, the Special Term made an order directing the cancellation of a judgment theretofore rendered against it. The judgment creditor took an appeal from the order and obtained a stay preventing the actual cancellation of the docket of the judgment. Pending the appeal the corporation was dissolved and a receiver was appointed who was directed to sell the real property of the corporation, subject to certain specified liens, not including the canceled judgment. The parties present at the sale had actual notice of the order directing the cancellation of the judgment. After the sale the Appellate Division rendered a decision sustaining, at a reduced amount, the judgment ordered to be canceled.

*Held*, that the purchaser at the sale acquired the property free from the lien of the judgment as reduced. MATTER OF COLEMAN..... 496

— Reference to hear and determine — the court cannot direct that a judgment entered upon the referee's report shall contain a provision, not authorized thereby, that a part of the proceeds of a sale may be secured by a bond and mortgage. SHRADY v. VAN KIRK..... 261

See REFERENCE.

— Transfer of a stock certificate after the announcement of a decision and before entry of judgment for its recovery against the transferor — when such judgment is admissible against the transferee — effect thereof.

PRINTING TEL. NEWS CO. v. BRANTINGHAM..... 280

See EVIDENCE.

— A decree of another State admitting a will to probate — duty of a claimant to assert rights in that State.

GARVEY v. U. S. FIDELITY & GUARANTY CO .. 391

See WILL.

— Foreclosure of a mechanic's lien — when a personal judgment is proper. CASTELLI v. TRAHAN..... 473

See LIEN.

**JUDICIAL NOTICE :**

See EVIDENCE.

**JUDICIAL SALE** — Purchaser under a judgment in partition — relieved from his purchase where guardians *ad litem* for infant defendants were connected in business with the attorneys for adverse parties — who is an "adverse party." *PARISH v. PARISH*..... 267  
*See* PARTITION.

— Sale of real property after the making of an order cancelling a judgment which is subsequently on appeal therefrom sustained in part — the purchaser acquires a title free therefrom. *MATTER OF COLEMAN*..... 496  
*See* JUDGMENT.

**JURISDICTION** — *Powers of courts.*  
*See* COURT.

**JURY** — *Impaneling of, trial by, and submission of a cause to juries.*  
*See* TRIAL.

**KINDERHOOK** — *Bridge in Columbia county — the town of Ghent, not the town of Kinderhook, must repair it.*  
*See* *MATTER OF WEBSTER*..... 560

**LABOR LAW** — *Incorporation in a public contract of unconstitutional provisions of the Labor Law — its execution not enjoined at the suit of a taxpayer.*  
*See* *MEYERS v. PENNSYLVANIA STEEL Co*..... 807

**LANDLORD AND TENANT** — Lease — right of a lessee to recover damages occasioned by an elevated railroad constructed with the assent of the lessor — effect of the lessee holding under a renewal provided for in the original lease — form of conveyance of easements to which the elevated railroad company is entitled on paying the damages — violation of a covenant against an assignment of a lease — effect of a consent to one assignment.  
*STORMS v. MANHATTAN R. Co*..... 94  
*See* EMINENT DOMAIN.

— Street railway company in New York city — a lessee is not bound to pay to the city a license fee for each car run prior to its acceptance of the lease — effect of its taking the demised property "subject to all debts and liabilities of" the lessor. *CITY OF NEW YORK v. THIRD AVENUE R. R. Co.* 379  
*See* MUNICIPAL CORPORATION.

— Street railway company in New York city — what company, as lessee, is bound to pay to the city a license fee for each car run — the lessor, not running cars, is not. *CITY OF NEW YORK v. SIXTH AVENUE R. R. Co.*..... 367  
*See* MUNICIPAL CORPORATION.

**LETTER** — *Unanswered, as evidence.*  
*See* EVIDENCE.

**LEX LOCI:**  
*See* CONFLICT OF LAW.

**LIBEL** — *Verdict of \$40,000 reduced to \$25,000.*] 1. In an action of libel, brought by a police magistrate in the city of New York, against the proprietor of a newspaper, which published, under circumstances authorizing an award of exemplary damages, articles falsely charging the magistrate with having been guilty of conduct in the exercise of his judicial duties which tended to degrade him in the public estimation and to hold him up to the contempt and scorn of the community as a hectoring, bullying, insulting magistrate who refused to give heed to a complainant who appeared before him and charged certain persons with the commission of outrageous crimes, a verdict of \$40,000 is excessive and will be reduced to \$25,000. *CRANE v. BENNETT*..... 102

2. — *What proof will not prevent an award of exemplary damages.*] Evidence that the articles in question appeared in the defendant's newspaper while he was absent from the United States and that, before going abroad, he left with the editors, sub-editors and other employees of the newspaper a notice that it was an imperative rule that nothing reflecting upon the reputa-

**LIBEL** — *Continued.*

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tion of any person should be published in the newspaper until the truth of the same had been ascertained after strict investigation, will not prevent an award of exemplary damages. *Id.*

3. — *Exemplary damages, when proper.*] The power to award exemplary damages in an action for libel is not restricted to cases where the publication was induced by actual malice, but extends to cases where the libel was recklessly or carelessly published. *Id.*

4. — *Reckless publications.*] Evidence that the first libelous article was prepared by one of the defendant's reporters from information which he had received from another and which he made no attempt to verify, and that the other articles were published after the plaintiff had protested against the first article and had declared in a letter written to the general manager of the defendant's newspaper that the contents of the first article were false, is sufficient to authorize a finding that the libelous articles were recklessly published. *Id.*

5. — *Testimony of a magistrate who is the subject of the libel that evidence was insufficient to hold accused parties.*] Upon the trial the plaintiff may properly be permitted to testify that the evidence submitted to him as a police magistrate by the complainant, referred to in the libelous articles, was insufficient to warrant the detention of the persons whom she accused. *Id.*

6. — *Letters written by him to the newspaper publishing the libel.*] Letters written by the plaintiff to the manager of the defendant's newspaper, in which he denounced the libelous articles as being false and demanded an apology from the publishers of the newspaper, are competent as indicating actual malice in the publications subsequently made. *Id.*

7. — *His statement as to what part was and what was not true.*] The propriety of allowing the plaintiff to state what parts of one of the alleged libelous articles were true and what parts were untrue is doubtful, but the error, if any, involved in permitting him to do so is not such as will warrant the reversal of a judgment in his favor. *Id.*

8. — *An article appearing in another paper to affect the statements of a reporter thereof on the trial.*] Upon the cross-examination of a reporter of another paper, the New York *World*, who was sworn as a witness for the defendant, an article written by a third person from facts furnished by the witness and published in the New York *World*, relating to the episode referred to in the alleged libelous articles, may properly be admitted in evidence for the purpose of affecting the story which the witness had given on his examination in chief, especially where it appears that the whole of the *World* article was subsequently printed in the defendant's newspaper and was a part of the defamatory matter alleged in the complaint. *Id.*

9. — *Copies of reports not admissible where the originals can be produced.*] Where, upon the examination of a police captain as a witness for the defendant, such police captain refers to an entry in a book containing copies of the reports made by the witness to his superior officers, the entry in such book should not be admitted in evidence when it appears that the entry was not in the witness' handwriting, that he never compared it with the original report and that the original was accessible and could be obtained by a subpoena. *Id.*

**LICENSE** — Street railway company in New York city — a lessee is not bound to pay to the city a license fee for each car run prior to its acceptance of the lease — effect of its taking the demised property "subject to all debts and liabilities of" the lessor.

CITY OF NEW YORK *v.* THIRD AVENUE R. R. Co. .... 379  
See MUNICIPAL CORPORATION.

— Street railway company in New York city — what company, as lessee, is bound to pay to the city a license fee for each car run — the lessor, not running cars, is not. CITY OF NEW YORK *v.* SIXTH AVENUE R. R. Co. . 367  
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**LICENSE — Continued.**

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— Street railway company in New York city — what company is not bound to pay to the city a license fee for each car run by it — its successor is not. *CITY OF N. Y. v. TWENTY-THIRD STREET R. CO.* ..... 878  
*See MUNICIPAL CORPORATION.*

— Cabs standing in front of hotels (not at hack stands) in the city of New York must pay a license fee of twenty-five dollars in addition to the three dollars license fee. *CITY OF NEW YORK v. REESING* ..... 417  
*See MUNICIPAL CORPORATION.*

**LIEN** — *Of a manufacturer who is not required to make delivery before payment — when, although the contract is entire, the lien does not cover the product manufactured before default — the giving of credit operates as a waiver of the lien.* 1. A mercantile agency, which desired to publish a reference book, entered into a contract with a printing house, by which the latter agreed to set the type for the book, print it and make it ready for binding. The contract fixed the price to be paid for the different branches of the work, and stipulated that the price for composition should include ownership of the linotype slugs, composing the pages and electrotype plates of such pages, and also that "payments will be made weekly covering the amount of work performed."

*Held*, that the contract was an entire one, and that, as it did not require the printing house to make deliveries thereunder prior to receiving payment, the printing house had an artisan's lien upon all work done and not paid for or delivered;

That, in the event of the mercantile agency's making default in the payment of the weekly installments, the printing house could not claim a lien upon linotype slugs manufactured and paid for prior to the default which the mercantile agency had allowed to remain in the possession of the printing house to facilitate the making of corrections in such slugs, especially when the printing house made a charge for the storage of such slugs, thus showing that its possession thereof was for the benefit of the mercantile agency and not under a claim of lien;

That the acceptance by the printing house of notes, in payment of the weekly installments due under the contract, operated (in view of the charge for storage of the linotype slugs) as a waiver of its right to assert a lien upon the slugs manufactured during the period covered by the extension of credit created by the notes, although the notes were not paid.

*BLUMENBERG PRESS v. MUTUAL MER. AGENCY.* ..... 87

2. — *Foreclosure of a mechanic's lien — when a personal judgment is proper.* A personal judgment cannot be granted in an action to foreclose a mechanic's lien unless the plaintiff succeeds in establishing a valid lien.

*CASTELLI v. TRAHAN.* ..... 472

**LIFE INSURANCE :**

*See INSURANCE.*

**LIMITATION OF ACTION** — *Where a note is payable "on demand after date" the statute begins to run the day after its date.* An action brought February 16, 1899, to recover upon a promissory note dated February 16, 1893, payable "on demand after date, \* \* \* with interest at 8% per annum," is not barred by the Statute of Limitations, *first*, because the note did not become due or payable until the day after its date; and, *second*, because if the note did mature on the day of its date the makers had all of that day in which to make payment and the cause of action did not accrue until the next day. *HARDON v. DIXON.* ..... 241

**LITTLE FALLS** — *Contract to erect a school building in the city of Little Falls — its board of education is not a corporation — the city is liable on contracts made by the board — when a failure to obey a statutory provision as to contracting a city debt is not available to the city as a defense to such a contract — nor the absence of the formal consent of the architect — what subletting of work to be done under a city contract does not violate chapter 444 of the Laws of 1897 — waiver of an architect's certificate.*

*See OCOBB & RUGG CO. v. CITY OF LITTLE FALLS.* ..... 592

**LUNATIC:**

*See* INSANE.

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**MANDAMUS** — *The existence of a remedy by action makes its granting discretionary.*] 1. While there is no inflexible rule that the mere existence of a remedy by action will defeat an application for a writ of mandamus, yet where such a remedy exists the application for a mandamus is addressed to the sound discretion of the court.

PEOPLE EX REL. MURRAY v. LINDENTHAL..... 515

2. — *Findings or short decision, where an issue is joined upon an alternative mandamus.*] Where an issue of fact, joined upon an alternative writ of mandamus, is tried before a judge without a jury, the parties having waived a jury trial, it is the duty of the trial judge to make and file findings or a short decision. PEOPLE EX REL. HAVRON v. DALTON..... 499

3. — *Procedure on appeal in the absence thereof.*] Where, on an appeal, in such a case, from an order dismissing the writ, it appears from the record that the trial judge omitted to make the requisite findings or decision, the Appellate Division will remit the case to the trial judge in order that the findings or decision may be made *nunc pro tunc*. *Id.*

— To compel a superintendent of buildings to enforce the building law — the owners of buildings to be affected thereby are necessary parties — review by the courts of the superintendent's approval of materials used.

PEOPLE EX REL. COOKE v. STEWART.... 181  
*See* MUNICIPAL CORPORATION.

— Municipal corporation — unexplained absence of a member of the fire department of New York city — what must be shown in the return to a mandamus to procure his reinstatement. PEOPLE EX REL. BRENNAN v. STURGIS. 151  
*See* MUNICIPAL CORPORATION.

**MANUFACTURER'S LIEN:**

*See* LIEN.

**MARINE INSURANCE:**

*See* INSURANCE.

**MARITIME LAW:**

*See* SHIPPING.

**MARITIME LIEN:**

*See* SHIPPING.

**MASTER AND SERVANT** — Services of a commissioner of deeds, employed by the city of New York, who takes affidavits to accounts of employees of the city — when he is not entitled to compensation, beyond his salary from the city. BENJAMIN v. CITY OF NEW YORK..... 63  
*See* MUNICIPAL CORPORATION.

— Services of a commissioner of deeds employed by the city of New York, in taking affidavits of city inspectors — a waiver of the right to compensation may be established by implication.

ROURKE v. CITY OF NEW YORK..... 72  
*See* MUNICIPAL CORPORATION.

— Discharge of a servant — defense that it was for good cause must be pleaded — bill of particulars thereof. SPITZ v. HEINZE.... 317  
*See* PLEADING.

— *Assumption of risk by the servant.*  
*See* NEGLIGENCE.

**MEASURE OF DAMAGES:**

*See* DAMAGES.

**MECHANIC'S LIEN:**

*See* LIEN.

**MINOR:**

*See* INFANT.

**MISJOINDER**— *Of parties.*  
See PARTY.

**MISREPRESENTATION** :  
See FALSE REPRESENTATION.

**MITIGATION** — *Of damages.*  
See DAMAGES.

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**MORTGAGE**— *To secure a note—when it does not require the payment of attorney's charges—an oral promise to pay them cannot be proved—taxable costs as a measure of compensation.]* 1. Default having been made in the payment of a note made by Max Hart to the order of Frieda Hart and discounted by the Bowery Bank of New York, the bank placed the note in the hands of its attorneys who brought suit thereon. After the summons and complaint in the action had been served and before any other proceedings had been taken therein, Max Hart offered to pay the note in installments and to give a mortgage to secure the payment thereof. This proposition was accepted and a mortgage was made to the bank requiring the mortgagor to pay the note, "together with all the costs and expenses incurred by said party of the second part in a certain action now pending in the Supreme Court of this State, wherein said party of the second part is plaintiff and said Max Hart and Frieda Hart are defendants."

After the execution of the mortgage, Hart failed to pay an installment due upon the note and judgment was entered by default for \$474.49, the balance due thereon. Thereafter the attorneys for the bank rendered a bill to it for \$150 for their services in the matter, which sum was a fair and reasonable charge. Subsequently Max Hart paid the judgment for \$474.49 and received a satisfaction piece thereof. The bank then brought an action to foreclose the mortgage, for the expense of \$150 incurred for legal services and attorney's fees in the matter, contending that, at the time the arrangement to accept the mortgage was made, Hart agreed to pay the expense that might be incurred in the suit and the attorney's charge for services to the bank.

*Held*, that the mortgage did not, by its terms, include the charges of the attorneys for any services rendered after its date, and that the verbal promises of Max Hart as to what he intended to pay were not competent to extend the obligation of the mortgage;

That, as it did not appear that the costs and expenses incurred by the bank prior to the time that the mortgage was executed and delivered exceeded the taxable costs included in the judgment entered in the action brought upon the note, the payment of that judgment, with interest, operated to satisfy the mortgage. **BOWERY BANK v. HART** ..... 121

2. — *Foreclosure of — a plea of the pendency of another action — it must allege that it was brought without leave of the court.]* An answer, interposed in an action to foreclose a mortgage, which alleges the pendency of another action between the parties to recover the mortgage debt is demurrable, unless it also alleges that the action which it pleads in bar was brought without leave of the court. (Code Civ. Proc. § 1628.) **SCHIEK v. DONOHUE** ..... 321

3. — *Allegation in a complaint that no other action was pending.]* An allegation in the complaint in a foreclosure action, "that no other action has been had for the recovery of the said sum secured by the said bond and mortgage," sufficiently complies with that provision of section 1629 of the Code of Civil Procedure which provides that the complaint "must state whether any other action has been brought to recover any part of the mortgage debt." *Id.*

4. — *Sufficiency of a tender not kept good.]* A tender of payment of the full amount due upon a bond and mortgage constitutes a good defense to an action to foreclose the mortgage, although the tender is not kept good.

A plea of tender, contained in the answer interposed in such an action, will be sustained although it is not averred that the tender has been kept good and no offer is made to pay the money into court. *Id.*

5. — *Such tender will not sustain a claim to have a mortgage annulled.]* This doctrine proceeds upon the ground that the tender discharges the lien of the mortgage, but not the mortgage debt. Consequently, where a mort-

**MORTGAGE** — *Continued.*

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gagor, who has made such a tender, seeks to have the mortgage canceled and discharged of record, he will not be granted such relief until he pays the mortgage or brings the amount thereof into court. *Id.*

6. — *When it will prevent an election to declare the principal sum due.* [Where a mortgage contains a provision that the whole of the principal sum should become due at the option of the mortgagee, after default in the payment of interest for thirty days, and the mortgagee, acting under this clause, elects to declare the principal sum due and brings an action to foreclose the mortgage, an answer interposed in such action which alleges that the defendant duly tendered to the plaintiff the full amount of interest due him in cash, personally, and that said plaintiff deliberately and willfully refused to accept the same, and further that the defendant made a tender within the time prescribed for the payment of the interest and has ever since been ready and willing to pay the same, is not demurrable, as the averments, if true, prevented an exercise by the plaintiff of his option to treat the whole of the principal sum as due and payable. *Id.*

— Trust — created by the assignment of mortgages to protect a vendor who has conveyed with warranty a part of the mortgaged premises — a subsequent assignment by the administrator of the mortgagee does not terminate the trust — the assignee cannot foreclose the mortgages to the prejudice of such vendor — rights of the latter's vendees. *RICHTMYER v. LASHER*. . . . . 574

*See* TRUST.

— Land set off in a partition suit "as appurtenant" to each of two other lots — rights of the owners of such two lots therein — the right passes under a mortgage of a lot "together with the appurtenances."

*PUTNAM v. PUTNAM*. . . . . 554

*See* PARTITION.

— Attachment — a bond and mortgage must be taken into the actual custody of the sheriff. *FISKE v. PARKE*. . . . . 422

*See* ATTACHMENT.

**MOTION AND ORDER** — *Reading in support of a motion an affidavit not served on the adverse party, condemned.*

*See* CHAPUIS v. LONG. . . . . 273

— *Denial of a motion for a nonsuit, how reviewed.*

*See* BRAUER v. OCEANIC STEAM NAVIGATION CO. . . . . 407

— *Motion for a new trial.*

*See* NEW TRIAL.

**MULTIFARIOUSNESS** — *A demurrer on the ground of multifariousness is not authorized by the Code of Civil Procedure.*

*See* PLEADING.

**MUNICIPAL CORPORATION** — *Dockage rights in New York city — specific performance of a contract by the city to purchase them — defense that the party agreeing to sell had no interest — construction of a reservation in a grant by the city of New York of land and dockage rights — an exception therefrom implies that an estate passed thereunder — exception void for uncertainty — what is an exercise of a reserved right precluding further action — effort of the city's consent to the construction and use of a pier — proviso in a lease as to the city's action — prescriptive right — application of "Sinking Fund Ordinance" — power of the common council to grant — implied consent from the city.] 1. In 1817 Henry Rutgers owned land in the city of New York adjoining the East river for the two blocks from Rutgers street to Clinton street, extending (high-water mark being for the most part above Water street) to the northerly line of Water street. May 1, 1817, the city, pursuant to the authority of chapter 86 of the Revised Laws of 1818, granted to him the land to be "gained out of the East River" bounded northerly by the south side of Water street, easterly by the west side of Clinton street, southerly by the northerly side of South street and westerly by the east side of Rutgers slip, excepting so much as would be necessary to extend Jefferson street, which lay between Rutgers street and Clinton street, to South street. Rutgers covenanted to build "wharves or streets" adjoining said prem-*

**MUNICIPAL CORPORATION**—*Continued.*

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ises and keep the same in repair, and that they should be "public streets or highways," and also, when so required, to fill and construct Water and South streets and to extend Clinton, Jefferson and Rutgers streets from Water to South street.

The grantor covenanted that the grantee "shall and lawfully may, from time to time, and at all times forever hereafter fully have, enjoy, take and hold to his and their own proper use, all manner of wharfage, crannage, advantages and emoluments growing or accruing by or from that part of the said wharf or street called South Street, which lies opposite to the hereby granted premises and fronting on the East River, excepting and reserving nevertheless so much of the said wharfage, crannage, advantages and emoluments as may accrue from so much of South Street as may be hereafter appropriated by the said parties of the first (part) for the purpose of forming and making a public slip or basin after the said public slip or basin shall be formed and made."

In 1831 a committee appointed by the common council of the city of New York to investigate the matter of dock facilities along the East river presented a report advocating the formation of a "basin or slip" by the construction of two piers, one at the foot of Clinton street and the other about eighty feet westerly toward Jefferson street. The resolution, recommended to carry out the report, was adopted.

May 1, 1832, the executors of Rutgers conveyed to Henry W. Bool a portion of the lands abutting on South street. At that time the lots had not been filled in and the conveyance was made expressly subject to the exception or reservation and other covenants contained in the deed to Rutgers. Subsequently Bool and the other proprietors constructed, at their own expense, pursuant to a resolution of the common council, a bulkhead on the south line of South street from Rutgers street to Clinton street and filled up the water lots agreeably to the Rutgers grant.

The westerly pier of the proposed slip was not built at the point originally contemplated, but was built at the foot of Jefferson street. In 1838 the city constructed another pier 180 feet long at the easterly side of Rutgers slip. In 1844 the "Sinking Fund Ordinance" was adopted, vesting the making of grants of land under water in "the Commissioners of the Sinking Fund of the city of New York" and prohibiting the construction of bulkheads and piers under such grants except with the consent of the common council. In 1847 or thereabouts, a resolution was passed providing for the construction of a pier 300 feet long midway between Jefferson and Rutgers streets, which pier, known as pier 45 (old number), was subsequently built. June 19, 1848, William and Thomas Dennistoun acquired, through certain mesne conveyances, the premises previously conveyed to Bool, together with the wharfage rights. Such conveyances were made by express stipulations therein subject to the conditions of the Rutgers grant. In 1849 William and Thomas Dennistoun constructed, at their own expense, pursuant to a resolution of the common council, a pier 800 feet long in front of their premises, which pier is known as pier 47 (old number), East river.

At the time this pier was constructed the title of the city to the land under the water of the East river only extended to a line drawn 400 feet from low-water mark. This line intersected pier 47 at about the middle. Pursuant to authority conferred by section 6 of chapter 574 of the Laws of 1871, the Commissioners of the Land Office granted to the city the land under water to an exterior line passing beyond the pier in question.

Since 1849 the Dennistouns and their successors in interest have had possession of the pier and bulkhead and have received the wharfage therefrom, have kept it in repair and have paid taxes thereon. It does not appear whether or not the commissioners of the sinking fund took any action with reference to the construction of such pier.

In 1871 a plan for the improvement of the East river water front was adopted. This plan was not carried out, but an amended plan was adopted in 1898 which provided for the construction opposite the premises included in the Rutgers grant of four piers over 450 feet long.

At the time of the adoption of the amended plan Mary Bell had succeeded to the Dennistouns' title under instruments which were not made subject to the Rutgers grant. January 4, 1900, the said Mary Bell entered into an agreement with the department of docks of the city of New York, by which



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she agreed to convey to the city of New York for a specified sum "good title to the several rights, titles and interests in and to the said wharfage rights, etc., appurtenant to one hundred and twenty feet (120) of bulkhead and to said Pier old No. 47, East River, with the rights to the lands under water and riparian and other rights, if any, in front thereof and connected therewith not now owned by the city of New York or by the People of the State of New York." The city subsequently refused to perform this agreement upon the ground that under the grant from the city of New York to Rutgers it was entitled to the possession of the premises for the purpose of a "public basin," viz., the purpose contemplated by the plan of improvement.

In a proceeding instituted by Mary Bell to compel the specific performance of the agreement of January 4, 1900,

*Held*, without examining into the validity or extent of Bell's title, that, as she was in possession of the premises and asserted title, rights and interests therein under a claim which was more than colorable, there was a sufficient consideration to support the city's agreement and that it should be required to specifically perform such agreement;

That it would be unreasonable to construe the exception or reservation in the Rutgers grant as giving the city the right to appropriate, for a public slip or basin, the entire bulkhead opposite the two blocks originally owned by Rutgers;

That if the city based its claim upon an exception from the grant this would necessarily imply that some estate was granted to Rutgers, for otherwise the exception would be repugnant to the grant;

That, construed as an exception, such exception would be void for uncertainty as it covered nothing then in existence or capable of being identified or omitted from the conveyance;

That the proper construction of the reservation contained in the grant to Rutgers required the city to exercise its alleged rights thereunder before requiring the abutting owners to construct the wharf and piers;

That the action of the city in 1881 in deciding to construct the two piers then contemplated was an exercise of its reserved rights and an abandonment of any right to locate a public slip or basin at that point;

That, having consented to the construction of pier 47 and acquiesced in its use for a period of fifty years, it was not competent for the city to appropriate it for a public slip;

That the fact that a lease executed by Bool's executors, February 1, 1841, contained a provision for a reduction of the rent in case the city should take the bulkhead for public use was not inconsistent with the above construction of the Rutgers grant;

That the sinking fund ordinance did not apply to that portion of pier 47 which was constructed beyond the 400-foot mark, and that the common council of the city had the right, under chapter 86 of the Revised Laws of 1818, to grant not only the city's consent to the construction of this part of the pier, but the consent of the State as well;

That, as this portion of the pier had been constructed and used under a claim of right for more than twenty years before the city obtained title to the land beyond the 400-foot line, the plaintiff had acquired a prescriptive right to maintain this part of the pier and to access thereto over the waters of the State;

That the pier in question, having been constructed by the abutting owner, with the consent of the common council, the sinking fund ordinance did not apply to any portion thereof;

That, if the sinking fund ordinance did apply to the pier in question, the consent of the common council should be regarded as having been given in conformity to, and in compliance with, the sinking fund ordinance, and not as a recognition of any superior title in the city. **BELL v. CITY OF NEW YORK. 487**

2. — *Street railway company in New York city — what company, as lessee, is bound to pay to the city a license fee for each car run — the lessor, not running cars, is not.* The complaint in an action brought by the city of New York against the Sixth Avenue Railroad Company, the Houston, West Street and Pavonia Ferry Railroad Company and the Metropolitan Street Railway Company, alleged that, prior to the incorporation of the Sixth Avenue Railroad Company, a contract was entered into between the city of New York

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and the incorporators or assignors of that railroad company which provided that "each of said passenger cars to be used on said roads shall be annually licensed by the Mayor; and there shall be paid annually for such licenses such sum as the Common Council shall hereafter determine;" that this contract was confirmed by the charter of the railroad company, and that on December 31, 1858, the common council of the city of New York adopted an ordinance providing, "Each and every passenger railroad car running in the City of New York below 125th street, shall pay into the city treasury the sum of fifty dollars, annually, for a license."

The complaint further alleged that on February 1, 1892, the Sixth Avenue Railroad Company leased its lines to the Houston, West Street and Pavonia Ferry Railroad Company, and that on December 12, 1898, the Houston, West Street and Pavonia Ferry Railroad Company was consolidated with the Metropolitan Street Railway Company, and that the latter railroad company had ever since operated the lines of the Sixth Avenue Railroad Company.

This action was brought to recover license fees for the cars operated upon the lines of the Sixth Avenue Railroad Company from 1895 to 1899 inclusive.

*Held*, that the obligation of the Sixth Avenue Railroad Company to pay a license fee for each car used upon its road terminated when it leased its road and franchise to the Houston, West Street and Pavonia Ferry Railroad Company;

That when the Houston, West Street and Pavonia Ferry Railroad Company became merged in the Metropolitan Street Railway Company, the latter company assumed the former company's liability for the payment of the license fees in question;

That the only cause of action alleged in the complaint was a cause of action against the Metropolitan Street Railway Company for the license fees for the cars actually used by that company in the operation of the lines of the Sixth Avenue Railroad Company;

That, consequently, the complaint was not demurrable on the ground that causes of action were improperly united therein, but that it was demurrable as to the Sixth Avenue Railroad Company and the Houston, West Street and Pavonia Ferry Railroad Company on the ground that it did not state a cause of action against those railroad companies;

That the complaint, however, stated a cause of action as to the Metropolitan Street Railway Company and was not demurrable as to that company. CITY OF NEW YORK v. SIXTH AVENUE R. R. Co. .... 367

3. — *Street railway company in New York city — a lessee is not bound to pay to the city a license fee for each car run prior to its acceptance of the lease — effect of its taking the demised property "subject to all debts and liabilities of" the lessor.* The complaint in an action brought by the city of New York against the Third Avenue Railroad Company and the Metropolitan Street Railway Company alleged that the grant made by the mayor, aldermen and commonalty of the city of New York to the incorporators of the Third Avenue Railroad Company, pursuant to which the railroad company was organized, provided that the incorporators of the railroad company "shall pay, from the date of opening the said railroad, the annual license fee for each car now allowed by law and shall have licenses accordingly," and that this grant was confirmed by the statute under which the railroad company was organized (Laws of 1854, chap. 140, § 3); that prior to the year 1894 the Third Avenue Railroad Company duly paid the annual license fees for its cars, but had neglected to do so since that time; that on April 3, 1900, the Third Avenue Railroad Company leased its roads to the Metropolitan Street Railway Company "subject to all debts and liabilities of the parties of the first part" (the lessor); that the lease contained an agreement on the part of the lessee to "pay, satisfy and discharge all municipal, county, state or government taxes and assessments, license fees or other charges of any description whatever which during the term hereby granted may be imposed upon the property hereby demised, or any part thereof, or upon any additions or extensions thereof."

The action was brought to recover license fees for the cars operated by the Third Avenue Railroad Company upon its lines during the years 1894 to 1899, inclusive.

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*Held*, that the complaint did not state a cause of action against the Metropolitan Street Railway Company;

That, as the Metropolitan Street Railway Company simply accepted a demise of the property of the Third Avenue Railroad Company, "subject to all debts and liabilities" of the Third Avenue Railroad Company, and did not agree to pay the existing debts and liabilities of that company, and as the Third Avenue Railroad Company was still an existing corporation, liable for its debts and obligations, the Metropolitan Street Railway Company was not liable for the license fees accruing prior to the execution of the lease;

That the provision in the lease requiring the lessee to "pay, satisfy and discharge all municipal, county, state or government taxes and assessments, license fees or other charges of any description whatever which during the term hereby granted may be imposed upon the property hereby demised, or any part thereof," rendered the lessee company liable for all license fees accruing after the execution and delivery of the lease, but did not relate to license fees which had accrued prior to the execution thereof.

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4. — *Street railway company in New York city — what company is not bound to pay to the city a license fee for each car run by it.*] The ordinance of the city of New York, passed December 31, 1858, providing that every passenger railroad car running in the city of New York below One Hundred and Twenty-fifth street shall pay into the city treasury an annual license fee of fifty dollars was not binding upon the Twenty-third Street Railway Company, which was incorporated in 1872, and which was not required, either by the terms of its charter or by any agreement with the city, to pay the license fee. CITY OF N. Y. v. TWENTY-THIRD STREET R. Co. .... 373

5. — *Its successor is not.*] The ordinance not having been binding upon the Twenty-third Street Railway Company, the Metropolitan Street Railway Company, which acquired the property and franchises of the Twenty-third Street Railway Company, cannot be required to pay a license fee upon the cars operated on the lines formerly operated by the Twenty-third Street Railway Company. *Id.*

6. — *Assessment for the cost of altering the grade of a railroad — until the commissioners decide that some part thereof is to be assessed upon the property of individuals the latter are not entitled to review the validity of the commissioners' appointment.*] Chapter 339 of the Laws of 1892, as amended, authorizes the elevation of the New York and Harlem railroad between One Hundred and Sixth street and the Harlem river in the city of New York, and provides that the expense of the improvement shall be borne by the New York and Harlem Railroad Company and its lessee, the New York Central and Hudson River Railroad Company, and the city of New York in equal proportions; that, upon the completion of the work and payment of the city's share of the cost thereof, commissioners of assessment shall be appointed who shall view the improvement, fix the area of assessment, and assess all or part of the expense of the improvement upon the premises included in the area of assessment, or upon the city of New York. The statute does not provide that the property owners shall have notice of the proceedings before the commissioners, but does provide that the owners of property assessed may object to the assessment after the commissioners have made their report and shall be heard by the commissioners upon such objections.

*Held*, that, until the commissioners had determined to assess the cost of the improvement upon specific property, no one was aggrieved by their appointment, and that, consequently, an owner of property situated within the possible area of assessment could not prosecute an appeal from the order appointing them. MATTER OF CITY OF NEW YORK. .... 136

7. — *Constitutionality of such an assessment.*] *Quare*, whether the Legislature had authority to provide that the expense of raising the grade of the railroad, which was apparently incurred in order to enable the railroad companies to comply with the United States statute requiring them to elevate their bridge across the Harlem river, should be assessed in whole or in part upon the specific property claimed to have been benefited. *Id.*

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8. — *Fees of commissioners of estimate and assessment in the city of New York.*] Section 998 of the Greater New York charter (Laws of 1897, chap. 878, as amended by Laws of 1901, chap. 466), relative to the taxation of the costs, fees and expenses of the commissioners of estimate and assessment appointed in a condemnation proceeding instituted by the city of New York, contemplates that the commissioners shall submit proofs from which the court may be able to see that the number of days charged for by the commissioners were necessarily devoted to the proceeding.

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9. — *What proof as to the number of days consumed must be furnished.*] Affidavits made by each of the commissioners, stating, in general terms, that they had performed and discharged all of their duties as such commissioners, and had been employed a specified number of days and would be engaged two more days in making a final report, which affidavits are supplemented by an affidavit made by an employee of the corporation counsel having charge of the books and accounts of the proceeding, who deposes that the expenses of the proceeding, other than the charges of the commissioners, are a certain sum and that the bill of costs of the commissioners is in all particulars correct, do not constitute such proof of the justice of the charges as the section requires. *Id.*

10. — *Charges for meetings at which nothing is done.*] The commissioners appointed in such a proceeding are not entitled to charge fees for attending meetings at which nothing is done or which are unnecessarily adjourned, even though the failure to do anything and the unnecessary adjournments are due to the action of the corporation counsel. *Id.*

11. — *Cabs standing in front of hotels (not at hack stands) in the city of New York must pay a license fee of twenty-five dollars in addition to the three dollars license fee.*] Livery stable keepers, doing business in the city of New York, who make an agreement with the proprietor of a hotel in that city to supply carriages or cabs to that hotel and who, with the written consent of such proprietor, but without the consent of the city, keep a number of cabs standing in front of the hotel awaiting passengers, must, in addition to the license fee of three dollars imposed on special hacks by sections 456 and 457 of the revised ordinances of the city of New York, pay for each of such cabs the additional fee of twenty-five dollars, imposed pursuant to sections 12 and 13 of the ordinance approved May 22, 1899, upon hacks using, with the written consent of the owner or lessee of the abutting premises, a public street as a private hack stand.

The enactment of the ordinance of May 22, 1899, was within the power of the municipal legislature. CITY OF NEW YORK v. REESING..... 417

12. — *Mandamus to compel a superintendent of buildings to enforce the building law — the owners of buildings to be affected thereby are necessary parties.*] A writ of mandamus to compel the superintendent of buildings of the borough of Manhattan to take such action as may be necessary to prevent an alleged violation of section 105 of the Building Code, in the construction of three new buildings, which have at the time been substantially completed or are in the process of construction, will not be issued where it appears that the action which it is asked that the superintendent of buildings be compelled to take will involve the destruction of the buildings to a greater or less extent, and that the owners of the buildings have not been made parties to the proceedings.

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13. — *Review by the courts of the superintendent's approval of materials used.*] *Quare*, whether, if it appears that the superintendent of buildings approved of the materials used in the construction of the buildings in question, his action in the premises can be reviewed by the court, and also whether, if his action is reviewable by the court, a citizen and resident of the borough in which the buildings are erected may institute the proceeding to review the superintendent's action. *Id.*

14. — *Contract with a municipality — an architect's certificate required thereby must be produced or an excuse pleaded for not doing so.*] Where a contract, made between the commissioners of the department of public parks

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In the city of New York and a building contractor, expressly provides that the furnishing of an architect's certificate shall be a condition precedent to the contractor's right to receive payment for any part of the work, if the contractor brings an action to recover a balance due under the contract upon the claim that he has made complete performance thereof, and does not produce the architect's certificate, he cannot recover upon the theory that the architect unreasonably refused to grant such certificate, unless he alleges that fact in his complaint. *Dwyer v. The Mayor of New York*. . . . . 224

15. — *Rights of the contractor where the city completes the work at less than the contract price.*] Where it appears that the work was taken from the contractor and completed by the city pursuant to a notice given under the contract, and that the cost of such completion was considerably less than the balance unpaid upon the contract price, the contractor may, if he so elects, recover such balance without regard to the architect's certificate. *Id.*

16. — *Specifications requiring the construction of a watertight flue—the contractor does not guarantee the efficiency of the specifications to secure that result.*] Where the plans and specifications furnished pursuant to the contract specify the manner in which an underground flue shall be constructed, and provide that such flue shall be rendered thoroughly watertight, the measure of the contractor's liability is to make the flue watertight so far as a construction in accordance with the plans and specifications will produce that result, but he does not guarantee the efficiency of the plans and specifications in that regard. *Id.*

17. — *Right to change the specifications.*] If the flue, after being constructed in accordance with the original plans and specifications, is found not to be watertight, a clause of the specifications providing, "Such details on a large scale or full size as may be necessary to more fully explain the general drawings will be furnished to the contractor at the proper time during the progress of the work. \* \* \*

"The various drawings and this specification are intended to cover a complete and first class job in every respect. Anything omitted in this specification and shown on the drawings, or *vice versa*, is to be done by the contractor without extra charge or expense," does not authorize the architect to alter the plans and specifications for the flue and require the contractor to reconstruct it in accordance with the altered plans and specifications without extra charge. *Id.*

18. — *Claim for extra work enforced.*] A provision in the contract that the contractor should make no claim for extra work, unless the same was agreed upon between the parties in writing, will not prevent the contractor from recovering for the work performed by him in reconstructing the flue pursuant to the directions of the architect and the board of park commissioners, as such provision related to work concededly not within the contract, and did not apply to changes and alterations in the work intended to be covered by the agreement.

Even if it should appear that the reconstruction of the flue was extra work within the meaning of the provision in question, the park commissioners, having authorized and directed such work to be done, would be estopped from contending that the plaintiff could not recover therefor because the contract required that an agreement in writing should be made concerning the same. *Id.*

19. — *Unexplained absence of a member of the fire department of New York city.*] Under section 735 of the charter of the city of New York which provides, "Unexplained absence, without leave, of any member of the uniformed force (of the fire department), for five days, shall be deemed and held to be a resignation by such member, and accepted as such," the position of a member of the uniformed force, coming within the terms of the section, is the same as that of a member who has resigned from the force, and no trial or action on the part of the fire commissioner is necessary, except to treat his absence as a resignation and accept it by dropping him from the force. *People ex rel. Brennan v. Sturgis*. . . . . 151

20. — *What must be shown in the return to a mandamus to procure his reinstatement.*] Where the commissioner seeks to justify his action in drop-

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ping a member of the uniformed force from the rolls under such section, he must allege, as a fact, that the member dropped was actually absent for five days and that his absence was unexplained.

In a mandamus proceeding, instituted by a member of the uniformed force, who had been removed, to procure his reinstatement, a return made by the fire commissioner alleging that the relator was charged by his foreman with being absent without leave for more than five days; that the commissioner had received a communication from the medical officers of the department stating that they had examined the relator and found him suffering from the effects of the abuse of alcoholic stimulants; that thereafter evidence was brought to the commissioner which satisfied him that the relator was guilty of the charge of being absent from duty without leave for more than five days, and that he thereupon made an order that the relator's name be dropped from the roll, is insufficient to defeat the application for reinstatement, as it does not allege that the relator was, as a matter of fact, absent without leave for more than five days and that such absence was unexplained. *Id.*

21. — *Contract to erect a school building in the city of Little Falls — its board of education is not a corporation — the city is liable on contracts made by the board.*] The board of education of the city of Little Falls and of the union free school district of the city of Little Falls, created by section 42 of the charter of that city (Laws of 1895, chap. 565, as amd.), whose powers and duties are defined partly by the charter and partly by the Consolidated School Law, is not a distinct corporate entity as is a board of education created by the Consolidated School Law, but is simply one of the agencies of the city, and a contract made by such board of education within the scope of its agency and within the provisions of the charter is binding upon the city. *OCCOR & RUGG CO. v. CITY OF LITTLE FALLS.*..... 592

22. — *When a failure to obey a statutory provision as to contracting a city debt is not available to the city as a defense to such a contract.*] In an action brought to foreclose a mechanic's lien for materials furnished under a contract for the erection of a school building made by the board of education of that city, the fact that the proposition to raise the sum (which was in excess of \$5,000) necessary for the erection of the school building was not submitted to the electors of the city, as required by section 80 of its charter, is not available to the city where it appears that such defense was not pleaded in its answer and that the money applicable to the discharge of the obligation incurred by the contract has been raised and is in the city treasury. *Id.*

23. — *Nor the absence of the formal consent of the architect.*] The city cannot escape liability upon the contract because a portion of the work was sublet by the contractor without the formal consent of the architect in violation of a clause contained in the contract where it appears that before the contract was made the contractor announced in the presence of the architect and the board of education his intention of subletting a portion of the contract work, and that no objection was made thereto either by the architect or the board, and that the sub-contractor had, with the knowledge of the architect and the board of education, performed his part of the work for over a year without objection and received partial payments therefor. *Id.*

24. — *What subletting of work to be done under a city contract does not violate chapter 444 of the Laws of 1897.*] Chapter 444 of the Laws of 1897, providing that if any contractor to whom a municipal contract is let shall, without the previous written consent of the department or official awarding the same, assign, transfer, convey, sublet or otherwise dispose of his contract or his right, title or interest therein, or his power to execute such contract to any other person, company or corporation, the municipal corporation shall be relieved and discharged from any and all liability and obligation growing out of said contract to said contractor, and to the person, company or corporation to whom he shall assign, transfer, convey, sublet or otherwise dispose of the same, is designed to prevent a party obtaining a municipal contract from assigning the whole or the substantial part of it to some one else and thus relieve himself from responsibility in respect thereto. It was not designed to prevent a practical mason who obtains a contract

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to erect a school building in a city from subletting the carpenter work to a practical carpenter. *Id.*

25. — *Waiver of an architect's certificate.*] Where a contract for the construction of a building provides that payments shall be made thereunder upon the certificate of the architect, and, during the performance of the work, the owner declares the contract forfeited and takes possession of the building for the purpose of completing the same, the production of the architect's certificate is not necessary to enable a person who furnished material used upon the work to maintain an action against the owner to foreclose his lien. *Id.*

26. — *Services of a commissioner of deeds, employed by the city of New York, in taking affidavits of city inspectors — a waiver of the right to compensation may be established by implication.*] In an action by a clerk, employed at a fixed salary in the department of water supply in the city of New York, to recover from the city fees for services rendered by him as a commissioner of deeds, in taking the affidavits of inspectors in the employ of the department, a waiver by the plaintiff of his right to recover for such services may be established by implication resulting from the circumstances of the case, and it is not necessary for the defendant to establish an express agreement by the plaintiff not to charge for such services.

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27. — *Services of a commissioner of deeds, employed by the city of New York, who takes affidavits to accounts of employees of the city — when he is not entitled to compensation beyond his salary, from the city.*] A clerk, employed at a fixed annual salary, in the bureau of highways of the city of New York, cannot recover compensation from the city for services rendered by him as a commissioner of deeds in taking the affidavits of certain employees of the department of public works to accounts presented by them, where it appears that he rendered such services, either believing them to be a part of his clerical duties or expecting compensation only from those who made the affidavits. BENJAMIN v. CITY OF NEW YORK..... 62

— Tax upon personalty — remedy where other parties liable to assess ment have been omitted from the rolls — what objections can be raised in proceedings to collect a tax — necessity of affixing seals to assessment rolls — acts to legalize taxes and local assessments — when unconstitutional.

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*See TAX.*

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— Negligence — duty of a city in regard to the construction and maintenance of a sewer. SUNDHEIMER v. CITY OF NEW YORK..... 53  
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**NAME** — *Of a firm, use of.*  
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**NEGLECT** — *Employee of a tannery falling into a vat — risk incident to the business — an objection that a defense was not pleaded is not first available on appeal — proof of freedom from contributory negligence — declarations after the accident as res gestæ.*] 1. In an action to recover damages resulting from the death of the plaintiff's intestate, it appeared that the defendant operated a tannery and that he maintained therein a series of cooling vats into which superheated tanning liquor was conveyed from time to time by means of a trough called a pump log; that the series of vats extended in a northerly and southerly direction and that the pump log was placed on top of the vats and a few inches from the westerly side thereof; that extending along the series of vats, a little east of the center thereof, was a staying timber used to bind the partitions of the vats together; that, for the purpose of providing the employee in charge of the vats with a platform upon which to stand while driving plugs into the bottom of the vats, a plank had

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been placed on top of the vats extending from the staying timber to the pump log.

It further appeared that on the day of the accident the intestate, who was an experienced employee of the defendant, was notified to take charge of one of the cooling vats which had been filled with the superheated tanning liquor, and that, in some undisclosed manner, he fell into the vat; that he ran into a boiler house about seventy feet away and called out to a co-employee, "Oh, George, I am scalded, the plank slipped off and threw me in."

No one saw the accident and there was no direct proof showing precisely how it occurred. There was testimony, however, given by men who went to the place of the accident immediately after its occurrence, tending to show that the westerly end of the plank was in the vat; that the other end rested on the staying timber and that the liquid was spattered upon the plank, pump log and partition.

*Held*, that, assuming that there was sufficient evidence to show that the intestate was upon the plank when, in some manner, it fell into the liquor, carrying him along with it, the plaintiff was not entitled to recover;

That the risk of falling into the vat while standing upon the plank was an incident of the intestate's employment and was assumed by him;

That the objection that the defendant had not pleaded as a defense the assumption of the risk by the intestate could not be taken for the first time upon appeal;

That, in the absence of testimony, either direct or inferential, that the intestate had exercised the caution which the conditions demanded of him, it could not be said that the plaintiff had shown that the intestate was free from contributory negligence;

That the declaration made by the intestate to his co-employee after falling into the vat was competent as part of the *res gesta*;

That, in order to make such a declaration competent, it must bear a close relation to the principal transaction and must be a spontaneous exclamation or an outburst of feeling and not a mere narration of a past event.

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2. — *Injury from the explosion of dynamite put in a hole drilled in a clinker in a kiln — when the complaint is properly dismissed — neglect of duty by a competent fellow-servant — the master is not bound to assume that it will occur.*] In an action to recover damages for personal injuries, it appeared that the defendant, an iron mining corporation, maintained several kilns for the purpose of roasting the iron ore; that in the roasting process clinkers would form within the kiln, which were sometimes so large that they could not be taken out through the opening therein; that for the purpose of breaking up these clinkers, the defendant employed four men, known as the "clinker gang," to drill holes in the clinkers, and explode dynamite therein.

The work of cutting and preparing the dynamite was done by the foreman of the gang, but the work of inserting the dynamite into the drilled hole and exploding the same was usually done by another member of the gang, one S.

Dynamite will explode by heat without coming in contact with a blaze. The necessity of having the clinkers cool before applying the dynamite was known to the workmen in charge, and it was a common practice for them to pour water upon the clinkers to cool them.

In 1899 the defendant employed the plaintiff as one of the "clinker gang," the particular part of the work performed by him being the striking of the drill used in making the holes for the insertion of the dynamite. On the third day that the plaintiff was employed he assisted in drilling a hole in a large clinker. The hole was filled with dynamite by S., who then left the kiln for the purpose of getting material to be used in lighting the fuse. During his absence, and while the plaintiff was removing the drill and other tools from the kiln, the dynamite prematurely exploded and seriously injured the plaintiff.

The plaintiff had received no instructions from the defendant as to the use of dynamite or as to the dangers attending its use, but he knew, in a general way, that it was explosive and dangerous.

*Held*, that the judgment entered upon the dismissal of the complaint by direction of the court should be affirmed;



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That all the acts connected with the work of blasting the clinkers related to the duty of the employees, and that, if there was any negligence in the performance of such work, it was the negligence of the plaintiff's fellow-servants, for which the defendant was not liable;

That the defendant had a right to assume that the plaintiff's fellow-servants, whose competency was not questioned, would not be negligent in their work, and that it was not necessary for it to inform the plaintiff of possible or probable dangers that would arise in case of negligence on the part of his fellow-employees. *KLOS v. HUDSON RIVER ORE & IRON Co.* . . . 566

8. — *Death of a track repairer engaged with his head down between the ties of an elevated railroad driving bolts — proof as to the continued violation by the engineers of a rule for the track repairer's protection — when not sufficient to establish direct or constructive notice to the company — duty to station a man near by to warn him.* In an action to recover damages resulting from the death of the plaintiff's intestate, who was a track repairer employed by the defendant, an elevated railroad company, it appeared that at the time of the accident the deceased was engaged, with his head down between the ties, driving bolts into a guard rail, and that while in this position he was struck and killed by an elevated train. Evidence was given tending to show that a green flag had been posted for the protection of the intestate and that a rule of the defendant required engineers to slow up their trains when approaching a green flag. The case was submitted to the jury upon the theory that liability on the part of the defendant could only be predicated upon the persistent and continued violation by the engineers of the rule requiring observance of the green flag.

The only evidence bearing upon this subject was given by a co-employee of the deceased, who was not vested with any authority in regulating or controlling the actions of other servants of the defendant. He testified as follows: "Q. When this green flag was set what would happen, so far as any of the trains were concerned, with regard to obeying this flag? \* \* \* A. I don't understand. Q. Would the speed of the trains decrease any? A. They didn't seem to mind the flag at all. Q. Didn't mind the flag at all? A. Not that flag. Q. Was that an every-day occurrence previous to this accident? \* \* \* A. Yes; every day."

*Held*, that, assuming that this testimony simply established a failure on the part of the engineers operating trains on the day of the accident to observe the green flag posted for the intestate's protection, such evidence would not warrant a finding that the defendant was negligent in failing to correct a habitual neglect of rules by its servants;

That, assuming that the testimony of the witness applied to all cases in which green flags were displayed and showed that they were habitually disregarded, it was insufficient to establish negligence on the part of the defendant, as it did not show that direct notice of the failure to observe the rule in question had been given to any officer or representative of the company having authority in the premises or that the disregard of such rule had continued for a length of time sufficient to charge the defendant with constructive notice thereof.

*Quare*, whether the defendant was guilty of negligence in failing to station a workman near the deceased to inform him of approaching trains.

*CLARK v. MANHATTAN RAILWAY Co.* . . . . . 284

4. — *Duty of motorman to stop a car to avoid a collision — not bound to anticipate that a pedestrian will retrace his steps — contributory negligence.* In an action to recover damages for personal injuries it appeared that the defendant operated a double-track street railroad on Third avenue, at its intersection with One Hundred and Sixty-third street, in the city of New York; that the westerly track was used for south-bound cars and the easterly track for north-bound cars, and that the space between the two tracks was five or six feet in width; that on the morning of the accident the plaintiff, after stopping on the sidewalk at the southwest corner of One Hundred and Sixty-third street and Third avenue to permit a south-bound car to pass, proceeded to cross the tracks; that when he reached the space between the north and south-bound tracks, or else had one foot in such space and one foot still on the south-bound track, he observed that a north-bound car, which was about one hundred feet away when he started to cross the street,

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was proceeding faster than he expected; that when he made this observation he stopped and then stepped back upon the south-bound track and was almost immediately and without warning struck by a south-bound car, which he had not seen before. The car was stopped within five or six feet after it struck the plaintiff, thus showing that the motorman had it under control.

When the plaintiff started to cross the street the car which struck him was less than one hundred feet away, and it was not shown that the plaintiff had exercised any care to discover the approach of such car either before leaving the sidewalk or before stepping back upon the south-bound track.

*Held*, that there was no obligation resting upon the motorman to stop the car until the danger of a collision appeared, and that, in the absence of proof that the motorman could have stopped the car any sooner than he did after the plaintiff stepped upon the south-bound track, the motorman was not guilty of negligence;

That the motorman was not guilty of negligence because he did not anticipate that the plaintiff, after he had passed over the south-bound track, would retrace his steps in order to avoid a collision with a north-bound car;

That the failure of the plaintiff to look for the car which struck him before leaving the sidewalk or before stepping back upon the south-bound track constituted contributory negligence on his part.

JACKSON v. UNION RAILWAY Co. .... 161

5. — *Injury to a hod carrier while carrying a hod up a plank from striking the hod against the floor timbers of the story above him—obvious risk, assumed.*] In an action brought to recover damages for personal injuries it appeared that the defendant was a mason and builder who was constructing a brick building; that the walls of the building had been erected to a point above the second story; that the first floor had been laid and that the floor timbers for the second floor had been placed in position; that the distance between the first floor and the bottom of the floor timbers of the second floor was eleven feet nine and one-half inches; that the defendant was also engaged in erecting a brick elevator shaft within the building and that the walls of the shaft had been completed to a point about eight or ten feet above the first floor; that a scaffold had been erected about the elevator shaft which consisted of three platforms, the inner one for the use of the masons laying the wall, the outer one for the use of the mason's helpers, and the center one, which was higher than the other two, being used to hold the materials supplied by the hod carriers; that the outer platform was six feet seven inches above the floor of the first story and that access was had thereto by means of planks placed with one end resting upon the floor of the first story and the other end resting upon the platform; that the distance between the top of the outer platform and the bottom of the floor timbers of the second floor was five feet two and one-half inches; that on the day of the accident the plaintiff, who was an experienced hod carrier in the defendant's employ, attempted to carry a hod of brick up one of the planks which was so placed that it ran at right angles with the overhead timbers; that while so doing, his hod struck against one of the timbers, causing him to fall from the plank and to sustain injuries.

The plaintiff was five feet eight or nine inches tall and the hod on his shoulder extended six inches above his head. He testified that he did not look up at the overhead timbers while walking up the plank, although he knew that every step he took brought him nearer to such overhead timbers. It further appeared that the plaintiff might have used one of the other planks if he so desired.

*Held*, that the danger of striking the overhead timbers was an obvious one, the risk of which the plaintiff assumed, and also that the plaintiff had been guilty of contributory negligence. MCCARTHY v. EMERSON. .... 563

6. — *A gateman at a railroad crossing closing the gate after signaling a man driving a horse and buggy to cross the tracks—liability where the horse takes fright and runs away—duty to look up and down the track—refusal of the court to allow the plaintiff to explain his failure to do so.*] In an action brought to recover damages for personal injuries it appeared that the plaintiff was driving a horse and buggy in the daytime southerly along a highway which crossed the defendant's railroad tracks; that, as he approached the

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crossing, a west-bound freight train, standing east of the crossing, was preparing to move and that, in order to avoid frightening his horse, the plaintiff drove into an adjoining yard and waited until the train commenced to move; that he then drove back into the highway at a point 100 feet or more distant from the crossing; that, as the train had about cleared the crossing, the defendant's gateman raised the gates guarding the crossing and beckoned the plaintiff to come across; that the plaintiff thereupon started his horse on a slow trot for the crossing, devoting his attention to the horse, the crossing and the gateman, and not looking either easterly or westerly along the tracks to any extent; that, as he came within a short distance of the tracks, an east-bound train suddenly came in sight and the gates were lowered in front of the horse, which took fright and ran away.

The evidence indicated that both the sudden lowering of the gates and the passing of the train contributed to the frightening of the horse. The plaintiff's view of the defendant's tracks to the west was obstructed by trees and other obstacles while the gateman's view in that direction was unobstructed.

*Held*, that it was error for the court to nonsuit the plaintiff;

That the underlying cause of the accident was the gateman's act in signaling the plaintiff to cross the tracks when the approaching train was too close to afford an opportunity for a safe passage, and that it was for the jury to say whether the giving of such signal constituted negligence on the part of the defendant;

That it could not be said, as a matter of law, that the plaintiff was guilty of contributory negligence in not looking up and down the tracks, as he approached the crossing, and seeing and avoiding the east bound train;

That it was improper for the court to refuse to allow the plaintiff to explain his failure to look to the west as he approached the crossing.

GRAY v. N. Y. CENTRAL & H. R. R. Co. .... 1

7. — *Charge as to the act of a boy in running upon a street railway track — proximate cause of injury.* In an action to recover damages resulting from the death of the plaintiff's intestate, a boy twelve years of age, who was struck and killed by one of the defendant's street cars, it appeared that the intestate ran upon the track while playing with some companions. The court ruled that the intestate was guilty of negligence in going upon the track and, although there was no evidence that he had exercised any care or caution for his safety after getting on the track, left it to the jury to say "whether the negligent entrance upon the track by the boy was negligence which caused or which contributed to cause the accident in question; in other words, whether the negligent entry upon the track by the boy was the proximate cause of the injury in question. If it was, and if after the boy was there, he exercised such care and prudence to avoid danger as was to be expected from a child of his age and intelligence then I say that you may find that the deceased was not guilty of any negligence which caused or contributed to cause this injury in question. \* \* \* Was the plaintiff's intestate, the boy, free from contributory negligence? If he ran upon this track within a few feet of the car, as some of the witnesses have testified, he was not. He was then guilty of contributory negligence. If, however, as I said before, he got upon this track and stood there looking away from the car in such a position and at such a distance from the car that the motor-man by the exercise of ordinary care and prudence should have seen him and should have stopped before the car ran over him, and otherwise exercised reasonable care and prudence, then I leave it to you to say whether his negligently getting upon the track was the proximate cause of the injury of which complaint is here made."

*Held*, that the charge was erroneous as the case was not a proper one for the application of the rule which the court had in mind.

FERRI v. UNION RAILWAY CO. .... 801

8. — *Injury from a wagon slipping down an embankment — failure to put a log by the side of the road — presence of ice on the highway — a witness who testified as to the condition of the road, allowed on his cross-examination to state how long the road had been out of repair.* In an action brought against a town to recover damages for personal injuries which the plaintiff sustained while driving along a highway in said town in consequence of his

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wagon slipping down an embankment at the side of the highway, it appeared that the road was not used in winter, and that it was not frequently used in summer; that at the point where the accident occurred it was only about seven feet wide, and that the embankment descended at an angle of forty-five degrees, and that no log or other barrier had been placed upon the edge of the embankment. The accident occurred in March, and ice which had formed upon the highway was a contributing cause thereof.

It further appeared, however, that the plaintiff had no prior knowledge of the existence of the ice, and the jury might have determined that his wagon would have safely passed over this part of the road if it had not been turned aside by a stone in the upper edge of the road.

*Held*, that a judgment entered upon a verdict in favor of the plaintiff should be affirmed;

That the jury had a right to say that the failure to put a log or some other barrier upon the edge of the embankment was a failure to exercise the degree of care which the law required of the highway commissioners;

That it could not be said, as a matter of law, that the plaintiff was guilty of contributory negligence, and that that question was properly submitted to the jury;

That as a witness called by the defendant had, upon his direct examination, distinctly sworn that the road was very bad at the point in question, no harm was done to the defendant in allowing the witness, upon his cross-examination, to state how long the road had been out of repair.

LITTEBRANT v. TOWN OF SIDNEY. . . . . 545

9. — *Injury to a truckman by reason of his horse being frightened by a box falling, while being lowered, into his wagon — a question is presented for the jury — effect of the horse not being fastened — the person lowering the box is not a fellow-servant of the truckman.* In an action to recover damages for personal injuries, it appeared that the plaintiff was a truckman who had entered into a contract with the defendant, a manufacturing corporation, by which he agreed to transport freight from the defendant's factory to the freight office and from the freight office to the defendant's factory for a specified sum per year; that the freight delivered to the plaintiff at the defendant's factory was usually lowered to him from an upper window by means of a rope and pulley; that on the occasion of the accident, while the plaintiff was standing in his wagon for the purpose of receiving a number of boxes which were being lowered to him and of guiding them into the proper places in the wagon, the boxes fell, owing to the fact that they had not been securely fastened; that they did not strike the plaintiff in their fall, but frightened the plaintiff's horse, which was not fastened, and caused him to run away, throwing the plaintiff out of the wagon and injuring him.

*Held*, that the questions of the defendant's negligence and of the plaintiff's freedom from contributory negligence were properly submitted to the jury and that a judgment entered upon a verdict in favor of the plaintiff should be affirmed;

That, as the horse was a kind and gentle one and the lines were within easy reach of the plaintiff and could easily be caught by him except for the sudden jump of the horse, it could not be said that the plaintiff's failure to hitch the horse constituted negligence as a matter of law;

That the servant of the defendant whose negligence caused the boxes to fall was not a fellow-servant of the plaintiff.

LOUGHRAN v. AUTOPHONE CO. . . . . 542

10. — *When the giving of a signal by bell or whistle at a railroad crossing is, as matter of law, sufficient — the jury are not to speculate as to what else should be done.* In an action to recover damages for personal injuries sustained by the plaintiff in a collision which occurred at midnight at a railroad crossing, between one of the defendant's trains and a carriage in which the plaintiff was riding, the court submitted to the jury the question whether any signals were given by bell or whistle of the approach of the train, and further left it to the jury to say whether these signals, if given, constituted a timely warning or adequate and sufficient protection under the circumstances of the case, charging that, if they did not, the defendant was guilty of negligence.

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Neither the counsel for the plaintiff nor the court suggested any other act or thing which might or should have been done by the defendant and the failure to do which the jury might find constituted negligence.

*Held*, that a judgment entered upon a verdict rendered in favor of the plaintiff should be reversed upon the ground that, under the conditions surrounding the crossing and the accident in question, it should be held, as matter of law, that if the signals were given, as claimed by the defendant, they were sufficient;

That, as the plaintiff had not suggested what other things, in addition to the signals by bell or whistle, the defendant should have done by way of giving warning of the approach of the train, the charge of the trial court was erroneous in that it permitted each juror to speculate as to what would be timely, adequate and sufficient warning and to find the defendant negligent if it did not give such warning.

SMITH v. LEHIGH VALLEY R. R. CO. (No. 1)..... 43

11. — *Injury from the fall of a defective scaffold — when the employee assumes the risk.*] In an action brought by a journeyman painter against his employer, a boss painter, to recover damages for personal injuries sustained by the journeyman in consequence of the collapse of a scaffold upon which the journeyman was standing while painting a house, it appeared that both the plaintiff and the defendant assisted in the construction of the scaffold. The plaintiff testified that he refused to use the scaffold until after he had been assured of its safety by the defendant. The defendant denied having given such assurance. The issue thus raised, and also the question whether the defects, if any, in the scaffold were obvious, were submitted to the jury. The court charged as follows: "the plaintiff and the defendant together erected the appliance; each knew there were no nails in it; each knew there were no ropes tied there, and it is for you to say whether or not, under those circumstances, it was not one of the obvious risks of the employment, which was part of the contract of hiring which the plaintiff assumed, because if the plaintiff did not assume the obvious risks of hiring, then an employer would be an insurer. \* \* \* The plaintiff must look out for himself; he must not go into a business with obvious risks if he does not want to assume them. \* \* \* It is for you to consider whether whatever risks there were, he did not see them."

*Held*, that the charge was proper and that a judgment entered upon a verdict in favor of the defendant should be affirmed. HARVEY v. MCCONCHIE. 361

12. — *Injury from a street car striking the rear of a wagon, which, at the same time, was struck by another car and forced back against the former one — when the question as to the motorman's negligence is not one of law — a question is presented for the jury.*] In an action brought against a street railway company to recover damages for personal injuries sustained by the plaintiff, the plaintiff's testimony tended to show that he was riding upon the rear of a truck, which was traveling northerly on the defendant's north-bound track; that while in this position one of the defendant's north-bound cars approached from behind and collided with the truck, injuring him. The testimony given by the defendant tended to show that as the north-bound car approached the truck the motorman thereof signaled the driver of the truck to leave the tracks, and that while the driver was in the act of leaving the track one of the defendant's south-bound cars collided with the truck and forced it back against the north-bound car, thus causing the injuries.

The court charged, at the plaintiff's request: "If the north-bound motorman, by the exercise of reasonable care, could or should have seen that there was danger of a collision between the south-bound car and the van, and yet kept his car up to within a few feet of the van, so that the van was driven back onto his car, then he was negligent."

*Held*, that if the jury found the facts to be as stated in the charge, it was for them to say whether or not such facts constituted negligence on the part of the motorman, and that it was error for the court to charge that, if they found such facts, the defendant was negligent, as matter of law.

CONNOR v. METROPOLITAN STREET R. CO. .... 384

13. — *Form of exceptions to a charge.*] Where, at the close of a jury trial, the plaintiff's counsel submits seventeen requests to charge, and the

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court states that he will charge "the requests one, two, three, four, five, six, seven, eight, nine, ten, eleven, twelve and fourteen," an exception taken by the defendant in the following form, "I except to your Honor's charging the following requests to charge made by the plaintiff—first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth and thirteenth and fourteenth," is sufficiently specific to enable him to bring up for review, on appeal, any of the requests specified in the exception. *Id.*

14. — *Proof as to a death having resulted from an accident.*] In an action to recover damages caused by the death of the plaintiff's intestate, it appeared that, as a result of the alleged negligence of the defendant, the intestate was, on August 2, 1899, thrown from a carriage upon her head and shoulders with considerable violence; that the night after the accident she suffered pain in her head, neck and shoulders; that for some time thereafter her husband continued to bathe the sore spots with witch hazel without relieving the pain; that, while attempting to perform her customary household duties, she suffered much pain; that in three or four weeks she was compelled to take to her bed; that on November third a physician was called who attended her from that time until she died; that shortly after the physician was called she gave premature birth to a deformed child; that subsequently she went into convulsions, in one of which she died early in January.

Her physician testified that, in his opinion, the convulsions resulted from an injury to her spine, and, in answer to a hypothetical question, expressed the opinion that the condition in which he found the intestate was due to the injuries she received at the time of the accident.

*Held*, that the question whether the accident was the cause of the intestate's death was one of fact for the jury. *SHORTSLEEVE v. STEBBINS* ..... 588

15. — *Refusal to charge that "if the plaintiff failed to look for an approaching car and was struck by one as soon as he put one foot upon its track" he was negligent, held to be error.*] In an action to recover damages for personal injuries sustained by the plaintiff in consequence of being struck by one of the defendant's electric cars, while he was crossing a city street, testimony was given tending to show that when the plaintiff was crossing the street he seemed to be unconscious or heedless of his surroundings. The defendant requested the court to charge: "If the plaintiff failed to look for an approaching car and was struck by one as soon as he put one foot upon its track, he was guilty of contributory negligence and the verdict must be for defendant." The court refused to charge as requested, but charged: "Of course, if the plaintiff was *reckless*, failed to look up and down, *heedless* of the consequences, and this car was in sight and he put his foot upon the track, clearly he was guilty of negligence, and the defendant is entitled to your verdict, if you believe that to be the facts established in the case."

*Held*, that the defendant was entitled to have the court charge as requested and that the modification of the request constituted error.

*MCKINLAY v. METROPOLITAN STREET R. Co.* ..... 256

16. — *Exceptions to a charge, when sufficient.*] At the close of the trial the court, in response to an inquiry made by the defendant's counsel concerning exceptions to the charge and to the refusals to charge stated, "You may take them after the jury have retired."

After the jury had retired the defendant's counsel said, "Your Honor will allow me an exception in due form to each request which is refused and to each request which was modified," and the court replied, "Yes."

*Held*, that the exception so taken was sufficient to enable the defendant to review the action of the court in modifying a request to charge. *Id.*

17. — *Liability for injury from an electric wire maintained in connection with an electric plant owned by a corporation—the corporation's vendor is not liable on the ground that the plant was under his control.*] Eugene L. Ashley, who had made a contract to light a village with electricity and had built a plant for that purpose, sold the plant to a corporation of which he became the president and the holder of a large majority of its capital stock. The sole relation between Ashley and the corporation, so far as appeared, was that of vendor and vendee, and from the time of the transfer to it the corporation, with the consent of the village, operated the plant and performed the lighting contract. After such transfer a man was killed by com-

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ing in contact with an electric wire which had been negligently maintained in connection with the electric plant.

*Held*, that Ashley could not be charged with liability for the accident on the ground that he was in control of the plant, notwithstanding that, under his contract with the village, he had no right to assign the contract to the corporation without the consent of the board of trustees evidenced by a resolution, and that such resolution was not passed until after the accident.

GORDON v. ASHLEY..... 525

18. — *A verdict against him rendered on that theory cannot be sustained on the theory that he erected a public nuisance.*] A verdict, rendered on the theory that Ashley was in control of the plant, cannot be sustained on the theory that he erected a public nuisance, where no such claim was made in the complaint and no such question was submitted to or passed upon by the jury. *Id.*

19. — *Injury because of a horse being frightened by a log by the roadside — testimony that the log was removed to prevent other horses being frightened is incompetent.*] Where, on the trial of an action to charge a town with negligence in permitting a log of wood, which the plaintiff alleged frightened her horse, to remain on a highway running through a wooded tract in such town, one of the contested questions is as to whether or not the log of wood was "a frightful object and was an object well calculated to alarm and frighten horses that might be driven along said highway," it is error to allow a witness (not the commissioner of highways of the town) to testify that he and his father took the log out of the road the day after the accident in order to prevent other horses from becoming frightened at it, as the question whether the log was calculated to frighten horses is a question for the jury and was not a proper subject for expert testimony.

WHITE v. TOWN OF CAZENOVIA..... 547

20. — *The maintenance of a leaky water closet which damages adjoining property constitutes a private nuisance.*] Where a person who, as the executor of and trustee under a will, owns and is in possession of certain premises, maintains upon such premises a leaky water closet, in consequence of which large quantities of water leak through the wall of an adjoining house, damaging it and subjecting the owner and tenants thereof to great annoyance and discomfort, the defective water closet constitutes a private nuisance, and the owner of the adjoining premises is entitled to maintain an action in equity against the executor and trustee to restrain the further maintenance of such nuisance and to recover the damages sustained by him therefrom. FINKELSTEIN v. HUNER. .... 424

21. — *Duty of a city in regard to the construction and maintenance of a sewer.*] All that is required of a municipal corporation when building a sewer is, that it shall adopt a plan of construction which is reasonably calculated to meet the needs of the present and those of the future so far as they can be reasonably anticipated. If it performs this duty and thereafter properly maintains such sewer, it is not liable for injuries to property resulting from the overflow of the sewer occasioned by a rain storm of extraordinary violence.

What evidence is insufficient to warrant a finding that an overflow of a sewer was due to negligence in the construction of the sewer or in its subsequent maintenance, considered. SUNDHEIMER v. CITY OF NEW YORK. .... 53

22. — *Rule as to keeping an employee to warn a laborer, engaged in sweeping switches, of the approach of shunted cars.*] Where it appears that it is customary, when shunting cars in a railroad yard, to station a brakeman at the front end of the cars being shunted, the necessity of promulgating a rule that some other employee shall be detailed to keep constant watch over a laborer employed in sweeping switches in the yard in sight of the shunted cars, in order to prevent such laborer from being struck by the shunted cars, is not so obvious as to make the question one of common experience and knowledge. CORCORAN v. NEW YORK, N. H. & H. R. R. Co. .... 505

— Proof of statements made in the presence of a party seriously injured — the injured party must be shown to have been cognizant of what was said. SCHILLING v. UNION RAILWAY CO. .... 74  
See EVIDENCE.

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— Additional allowance of costs — an action to recover for personal injuries in a collision at a railroad crossing is not extraordinary.  
*SMITH v. LEHIGH VALLEY R. R. Co.* (No. 2)..... 47  
*See COSTS.*

— Evidence sufficient to establish that a particular injury was caused by the accident. *MULLER v. METROPOLITAN STREET R. Co.*..... 221  
*See EVIDENCE.*

**NEGOTIABLE INSTRUMENT** — Transfer of a stock certificate after the announcement of a decision and before entry of judgment for its recovery against the transferrer — when such judgment is admissible against the transferee — effect thereof.

*See EVIDENCE.*

— *Law relating to.*  
*See BILLS AND NOTES.*

**NEW TRIAL** — *Costs — when they should not be imposed as a condition of granting a new trial.*] Where a verdict in favor of a plaintiff is set aside on the ground that he failed to prove his case, there is no rule which requires that costs shall be imposed as a condition of granting a new trial.

In an action to recover commissions for procuring a purchaser of real property for the defendant, the questions whether there was an employment, whether the plaintiff procured a purchaser and whether the defendant ever agreed to pay him for so doing, were submitted to the jury which found a verdict for the plaintiff.

The court set aside the verdict on the ground that there was no evidence that the purchaser was ever ready to sign the contract to purchase the defendant's property; no evidence that the contract between the defendant and purchaser was ever in fact prepared, and, therefore, no evidence that the plaintiff had obtained a person who was ready to purchase on terms satisfactory to the defendant, and that the weight of evidence was against the plaintiff.

*Held*, that costs should not have been imposed as a condition of granting a new trial. *COHEN v. KRULEWITCH*..... 126

**NEW YORK CITY** — *Dockage rights in New York city — specific performance of a contract by the city to purchase them — defense that the party agreeing to sell had no interest — construction of a reservation in a grant by the city of New York of land and dockage rights — an exception therefrom implies that an estate passed thereunder — exception void for uncertainty — what is an exercise of a reserved right precluding further action — effect of the city's consent to the construction and use of a pier — proviso in a lease as to the city's action — prescriptive right — application of "Sinking Fund Ordinance" — power of the common council to grant — implied consent from the city.*

*See BELL v. CITY OF NEW YORK*..... 487

— *Assessment of real property in New York city — a review thereof rests upon the application made to the assessors — what does not establish an overvaluation — what is not a statement that the property is assessed for more than the sum for which it would sell — unrented space, not considered.*

*See PEOPLE EX REL. GREENWOOD v. FEITNER*..... 428

— *Street railway company in New York city — a lessee is not bound to pay to the city a license fee for each car run prior to its acceptance of the lease — effect of the taking of the demised property "subject to all debts and liabilities of" the lessor.*

*See CITY OF NEW YORK v. THIRD AVENUE R. R. Co.*..... 879

— *Street railway company in New York city — what company, as lessee, is bound to pay to the city a license fee for each car run — the lessor, not running cars, is not.*

*See CITY OF NEW YORK v. SIXTH AVENUE R. R. Co.*..... 867

— *Street railway company in New York city — what company is not bound to pay to the city a license fee for each car run by it — its successor is not.*

*See CITY OF NEW YORK v. TWENTY-THIRD STREET R. Co.*..... 878



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— *Mandamus to compel a superintendent of buildings to enforce the building law — the owners of buildings to be affected thereby are necessary parties — review by the courts of the superintendent's approval of materials used.*

See *PEOPLE EX REL. COOKE v. STEWART*..... 181

— *Services of a commissioner of deeds, employed by the city of New York, who takes affidavits to accounts of employees of the city — when he is not entitled to compensation, beyond his salary, from the city.*

See *BENJAMIN v. CITY OF NEW YORK*..... 62

— *Services of a commissioner of deeds, employed by the city of New York, in taking affidavits to city inspectors — a waiver of the right to compensation may be established by implication.*

See *ROURKE v. CITY OF NEW YORK*..... 72

— *Conviction for vagrancy in the boroughs of Manhattan and the Bronx — constitutionality of the provisions for the prisoner's earlier discharge in case of his not having been previously convicted.*

See *PEOPLE EX REL. ABRAMS v. FOX*..... 245

— *Fees of commissioners of estimate and assessment in the city of New York — what proof as to the number of days consumed must be furnished — charges for meetings at which nothing is done.*

See *MATTER OF CITY OF NEW YORK*..... 433

— *Municipal corporation — unexplained absence of a member of the fire department of New York city — what must be shown in the return to a mandamus to procure his reinstatement.*

See *PEOPLE EX REL. BRENNAN v. STURGIS*..... 151

— *Cabs standing in front of hotels (not at hack stands) in the city of New York must pay a license fee of twenty-five dollars in addition to the three dollars license fee.*

See *CITY OF NEW YORK v. REESING*..... 417

— *Commission to condemn land in New York city — the clerks thereof are to be furnished by the corporation counsel.*

See *MATTER OF BOARD OF PUBLIC IMPROVEMENTS*..... 351

— *A physician's certificate filed in the New York city health department is incompetent evidence of his patient's death.*

See *ROBINSON v. SUPREME COMMANDERY*..... 215

**NEW YORK STOCK EXCHANGE SEAT** — *Transfer tax — the right acquired by the legal representatives of a decedent in a Stock Exchange seat held by him is not subject thereto.*

See *MATTER OF HELLMAN*..... 355

**NONSUIT** — *Denial of a motion for a nonsuit, how reviewed.*

See *APPEAL*.

See *TRIAL*.

**NOTICE** — *The maintenance of a leaky water closet which damages adjoining property constitutes a private nuisance — when a request to abate it or proof of knowledge is unnecessary.*

See *FINKELSTEIN v. HUNER*..... 424

**NUISANCE** — *The maintenance of a leaky water closet which damages adjoining property constitutes a private nuisance.] 1. Where a person who, as the executor of and trustee under a will, owns and is in possession of certain premises, maintains upon such premises a leaky water closet, in consequence of which large quantities of water leak through the wall of an adjoining house, damaging it and subjecting the owner and tenants thereof to great annoyance and discomfort, the defective water closet constitutes a private nuisance, and the owner of the adjoining premises is entitled to maintain an action in equity against the executor and trustee to restrain the further maintenance of such nuisance and to recover the damages sustained by him therefrom.* *FINKELSTEIN v. HUNER*..... 424

**NUISANCE** — *Continued.*

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2. — *When a request to abate it or proof of knowledge is unnecessary.*]  
In such an action it is not necessary for the plaintiff to prove a request to the defendant to abate the nuisance, nor, where it does not appear that the nuisance existed before the defendant became the owner of the premises, to show that the defendant had knowledge or notice of the existence of the nuisance before the action was brought. *Id.*

— Liability for injury from an electric wire maintained in connection with an electric plant owned by a corporation — the corporation's vendor is not liable on the ground that the plant was under his control — a verdict against him rendered on that theory cannot be sustained on the theory that he erected a public nuisance. *GORDON v. ASHLEY*..... 525  
*See NEGLIGENCE.*

**OFFSET :**

*See SET-OFF.*

**ORAL EVIDENCE :**

*See EVIDENCE.*

**ORDER :**

*See MOTION AND ORDER.*

**ORDINANCE** — *Of municipalities, construction, etc., of.*

*See MUNICIPAL CORPORATION.*

**PARENT AND CHILD** — *Insurance — payable to heirs at law — a child taken into the family is not included therein.*

*See MERCHANT v. WHITE* ..... 539  
*See INSURANCE.*

**PAROL EVIDENCE :**

*See EVIDENCE.*

**PARTITION** — *Purchaser under a judgment in partition — relieved from his purchase where guardians ad litem for infant defendants were connected in business with the attorneys for adverse parties — who is an "adverse party."]*

1. Rule 49 of the General Rules of Practice, which provides, "No person shall be appointed guardian *ad litem*" unless he "has no interest adverse to that of the infant, and is not connected in business with the attorney or counsel of the adverse party," should be construed in its broadest sense, and when so construed the term "connected in business" with the attorney or counsel of the adverse party contemplates any kind of business association and includes clerks as well as partners.

The terms "interest adverse" and "adverse party" should receive a similar construction, and the rule should not be limited to cases wherein it has been adjudged that the interests of the infant are or are not adverse, but should be applied as well to cases in which that question is involved.

In an action to partition real property passing under the 8d paragraph of the will of Daniel Parish it appeared that the testator devised the property to his two daughters, Susan D. Parish and Helen Parish, for life, and directed that after the termination of such life interest the property should be sold by his executors and the proceeds be divided equally among his children then living (excepting one son) and the issue, if any, of such as should have died, the issue of any deceased child taking their parent's share *per stirpes*. At the end of such paragraph was a statement that the testator desired his daughters to be able to maintain their usual style of living, and it was under this provision that the action was sought to be maintained.

Certain infant great grandchildren of the testator, whose interests depended upon the death of their grandfather or grandmother, as the case might be, prior to the death of the survivor of the two life tenants, were made parties to the action. The attorney for the plaintiffs was a clerk in the office of a firm of lawyers who appeared for the adult defendants, and a member of this firm appeared for some of the infant defendants, while another clerk in their office appeared for other infant defendants. The questions litigated in

**PARTITION** — *Continued.*

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the action included the construction of the will, the right to maintain the action and the time of the sale.

*Held*, that the infant defendants were necessary parties to the action and were entitled to be represented by guardians *ad litem* who were in no way connected in business with the attorney for parties who had rights which were or might be adverse to those of the infants;

That, as the infants had not been represented by proper guardians *ad litem*, the purchaser at the partition sale was entitled to be relieved from his purchase, notwithstanding that it appeared from the terms of the judgment that, even if the infants had been represented by proper guardians *ad litem*, the infants could not have changed the judgment rendered or have prevented the sale from taking place. *PARISH v. PARISH*..... 267

2. — *Land set off in a partition suit "as appurtenant" to each of two other lots — rights of the owners of such two lots therein — the right to pass under a mortgage of a lot "together with the appurtenances."*] In 1875, when an action was brought to partition lands in the village of Saratoga Springs which were owned by the heirs of Lewis Putnam as tenants in common, a certain strip of land formed the outlet to the street of what was known as the Putnam homestead lot and also formed a means of access to the rear of what was known as the William Putnam house. The commissioners appointed in the action set off the homestead lot, which was known as lot No. 10, to Jennie L. Putnam, and the William Putnam house, which was known as lot No. 8, to John L. Putnam, and in their report disposed of the strip before mentioned as follows: "We have also set off in common to defendants John L. Putnam and Jennie L. Putnam as appurtenant to the lot known as the William Putnam House and marked No. 8 on the annexed maps, and the premises last above described as the 'Homestead' and Marked No. 10 on the annexed maps."

*Held*, that the commissioners did not intend to set off the strip in question to John L. Putnam and Jennie L. Putnam as tenants in common, but that it was their intention to give each of such persons and their grantees a common right of usage in the strip as an entirety, and that neither of them had power to force a division of the strip or to exclude the other owner from any portion thereof;

That a mortgage executed by John L. Putnam upon lot No. 8 "together with the appurtenances" included the mortgagor's rights in the strip of land in question. *PUTNAM v. PUTNAM*..... 554

**PARTNERSHIP** — *Firm name — right of an assignee acquiring the good will from the legal representatives of the last surviving partner — action to restrain a corporation from adopting such firm name in its corporate title.*] Although the personal representatives of the last survivor of a firm cannot assign the firm name, as such, the good will of the firm, which is assignable by them, includes the right of the purchaser to advertise and hold himself out to the public thereafter as the successor to the property and business of the extinct firm, and where a projected sale of such good will has not been consummated because a corporation has appropriated the firm name for its corporate title, a court of equity will intervene to restrain the corporation from making further use of the firm name.

*FISK v. FISK, CLARK & FLAGG*..... 83

— Reference — it cannot be ordered until an issue as to the existence of a partnership is first determined. *JONES v. LESTER*..... 174  
*See REFERENCE.*

**PARTY** — *Demurrer* — it will not lie for a misjoinder of parties defendant — action against both an agent and his undisclosed principal — complaint not demurrable for misjoinder of two causes of action nor as not stating a cause of action against the agent — when the plaintiff must elect which he will hold liable. *TWE v. WOLFSOHN*..... 454  
*See PLEADING.*

— Agreement by a person to leave all his property to one who should live with him as a daughter — specific performance thereof — action against the promisor's administrators and heirs — a demurrer does not lie for a misjoinder of parties defendant. *HALL v. GILMAN. (No. 1)*..... 458  
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— Mandamus to compel a superintendent of buildings to enforce the building law — the owners of buildings to be affected thereby are necessary parties. *PEOPLE EX REL. COOKE v. STEWART*..... 181  
*See MUNICIPAL CORPORATION.*

— Revivor of a proceeding for an accounting by an executor who dies while it is pending — notice to all parties in interest.  
*MATTER OF TREADWELL* ..... 165  
*See SURROGATE.*

— "Party" in the Code of Civil Procedure, § 964, defined.  
*LANE v. BOCHLOWITZ*..... 171  
*See VENUE.*

**PATENT** — *Construction of.*  
*See DEED.*

**PAYMENT** — Mortgage foreclosure — sufficiency of a tender not kept good — it will not sustain a claim to have a mortgage annulled — when it will prevent an election to declare the principal sum due. *SCHIECK v. DONOHUE*... 331  
*See PLEADING.*

**PENAL CODE** — § 96 — *Section 96 of the Penal Code is not limited to affidavits required by the laws of the State of New York.*  
*See PEOPLE v. MARTIN*..... 396  
 [See table of sections of the Penal Code cited, ante, in this volume.]

**PERJURY** — *Section 96 of the Penal Code is not limited to affidavits required by the laws of the State of New York — indictment charging two persons with the crime of perjury, and also that one of them counseled the acts of the other — it charges both as principals with the commission of one offense.*  
*See PEOPLE v. MARTIN*..... 396

**PERSONAL PROPERTY** — *Transfer of a stock certificate after the announcement of a decision and before entry of judgment for its recovery against the transferor — when such judgment is admissible against the transferee — effect thereof.*

*See PRINTING TEL. NEWS CO. v. BRANTINGHAM*..... 280

— *The cost of store fixtures as evidence of value.*  
*See PERLBERGER v. GRELL*..... 128

— *Sales of.*  
*See SALE.*

**PERSONAL TRANSACTION** — *With a deceased or insane person.*  
*See EVIDENCE.*

**PHYSICIAN** — Action to determine the validity of the probate of a will — testimony of physicians based upon a diagnosis of incipient paresis made by one of them three years before the testator's death and contradicted by his subsequent condition — it does not require the submission of the case to the jury. *PHILIPS v. PHILIPS*..... 118  
*See WILL.*

— A physician is incompetent to testify as to the cause of his patient's death — his certificate filed in the New York city health department is also incompetent. *ROBINSON v. SUPREME COMMANDERY*..... 215  
*See INSURANCE.*

— Evidence — compensation of a physician — what question in regard thereto, although objectionable, does not require a reversal.  
*MULLER v. METROPOLITAN STREET R. CO.*..... 221  
*See EVIDENCE.*

**PLACE OF TRIAL:**  
*See VENUE.*

**PLEADING** — *Allegation as to liability imposed by the laws of another State for pretending to be officers of a pretended corporation — when it is contractual and not penal — liability at common law.*]

1. The complaint in an action alleged "that it was at all the times hereinafter mentioned, and still is, the law of the State of Illinois that whenever any person or persons, being or pretending to be officers or agents or directors of any stock corporation or pretended stock corporation organized or pretended to be organized under the laws of the State of Illinois, assume to exercise corporate powers or use the name of any such corporation or pretended corporation, without first filing, or causing to be filed on behalf of such corporation or pretended corporation, in the office of the recorder of deeds of the county where the principal office of such corporation or pretended corporation is located, a certificate of the complete organization of the said corporation, issued by the Secretary of State of the State of Illinois, such persons are jointly and severally liable for all debts and liabilities made or contracted by them in the name of such corporation or pretended corporation; and that such liability may be enforced against such persons in an action at law, brought against them or any of them in any court of competent jurisdiction, by any person with whom such debt shall have been contracted;" that at all the times in the said complaint mentioned the defendants pretended to be officers and agents and directors of a pretended stock corporation organized under the laws of the State of Illinois, and that they did assume to exercise corporate powers and to use the name of the said pretended corporation without having filed, or caused to be filed on behalf of the said corporation, a certificate required by law to be filed in the office of the recorder of deeds in the county wherein the principal office of such company was located; that between the 20th day of December, 1896, and the 19th day of January, 1899, the defendants "so assuming and pretending as aforesaid," did purchase from the plaintiff, in the name and on the alleged behalf of said pretended corporation, certain goods, wares and merchandise of the value in all of the sum of \$752, which said sum defendants promised to pay to plaintiff, and upon which there is still due and owing to the plaintiff the sum of \$678.21. For a second cause of action the plaintiff, upon the facts set forth in the first cause of action, sought to charge the defendants with liability upon a draft drawn in payment for the goods mentioned in the first cause of action.

*Held*, that from the express averments of the complaint it appeared that no corporation was ever in fact organized and that the defendants pretended to be officers of a corporation having no legal existence;

That it was only necessary for the plaintiff to show that the pretense that there was an existing corporation was made at the time the transaction in suit was had and that the statute set forth in the complaint was then in force; that such facts were averred in the complaint in plain and unmistakable language;

That, as the action was not brought upon the theory that a corporation actually existed, it was not necessary for the complaint to aver the time when the statute referred to therein was adopted or whether or not it was retroactive or when the corporation in question was organized;

That, as the liability sought to be enforced against the defendants was incurred in the purchase of goods, it was purely contractual and not penal, and that the courts of the State of New York would enforce the same;

That, independent of the question whether the complaint was sufficient to bring the case within the terms of the Illinois statute, it stated facts sufficient to impose a common-law liability upon the defendants as individuals engaged in a joint venture. *WORTHINGTON v. GRIESSER*.....

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2. — *Agreement by a person to leave all his property to one who should live with him as a daughter — specific performance thereof — action against the promisor's administrators and heirs.*] Helen Potts Hall brought an action against the administrators of the estate of George F. Gilman, deceased, his heirs at law and all others interested in his estate, to compel the specific performance of a contract alleged to have been made between the plaintiff and George F. Gilman, by which Gilman agreed that if the plaintiff "should continue to live with him and care for him as a daughter until the time of his death she should have and be entitled to all his property, both real and personal, as fully and to the same extent as if she were his sole lawful issue."

**PLEADING — Continued.**

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The complaint alleged that Gilman was a childless widower who was under no moral or legal obligations to his collateral relatives and lived on unfriendly terms with them; that several years prior to his death the decedent "having conceived a strong personal regard for this plaintiff, and being desirous that she should become a member of his household, adopted this plaintiff as his daughter, and did make her a member of his household and thereafter until the time of his death, plaintiff resided with him as his daughter, receiving from him the care, support and affection of a father, managing his household and rendering to him the same obedience and affection as if she had been his natural daughter;" that the agreement in suit was made a few months prior to the decedent's death, "in consideration of said services and affection and as an inducement for her to render the same as long as he lived and for other good and valuable considerations;" that the plaintiff duly performed the contract on her part and that the services rendered by her pursuant thereto were of great value to the decedent, but were "of such a character that they cannot be readily admeasured and are not capable of exact ascertainment or valuation."

*Held*, that a demurrer interposed to the complaint by a defendant who was a daughter of a deceased sister of the decedent should be overruled;

That the agreement, as stated in the complaint, was not void for uncertainty or on the ground that it was against public policy;

That it could not be said, as matter of law, that specific performance of such agreement should not be enforced;

That the complaint stated but a single cause of action and was, therefore, not demurrable on the ground that a cause of action against the decedent's administrators was united with a cause of action against his heirs;

That it was proper to unite all of the parties interested in the estate in order to avoid a multiplicity of suits and procure an adjudication that would finally determine the question;

That the question whether or not the complaint stated a cause of action as to all of the other defendants did not concern the demurring defendant.

HALL v. GILMAN. (No. 1) . . . . . 458

3. — *A demurrer does not lie for a misjoinder of parties defendant.*] A demurrer will not lie for a misjoinder of parties defendant, but it will lie for a defect of parties defendant. The defect of parties defendant for which a demurrer will lie means a non-joinder and not a misjoinder of parties. *Id.*

4. — *Multifariousness.*] A demurrer on the ground of multifariousness is not authorized by the Code of Civil Procedure. *Id.*

5. — *When no sufficient basis is shown for an order of interpleader.*] A temporary receiver in bankruptcy having come into possession of a policy of insurance on the life of the bankrupt, the court appointing him made an order directing him to deliver the policy to one Chapuis, and providing that upon compliance with the order the receiver should be discharged from liability in respect to the order. The receiver refused to comply with the order, and Chapuis brought an action in replevin against him to recover possession of the policy. The receiver then made a motion to substitute one Parkhurst as defendant in the replevin action, alleging "that one Arthur H. Parkhurst, not a party to this action, made a demand against deponent for the same property, without collusion with this deponent; that the said Parkhurst claims the said property by virtue of an order made in the City Court of the city of New York, wherein and whereby the said Arthur H. Parkhurst was appointed receiver of the property, assets and effects of one Isidore Marty, and that the said Arthur H. Parkhurst, as deponent is informed and verily believes, has qualified as such receiver and claims the said policy of insurance as the property of the said Isidore Marty, and he claims to be entitled to the same by reason of such receivership." No facts were stated tending to show that Parkhurst's claim had any just or reasonable foundation.

*Held*, that the order of interpleader should have been denied.

CHAPUIS v. LONG. . . . . 273

6. — *Demurrer — when allegations of false representations on a sale, set up as a complete defense to an action for the purchase price, are demurrable — counterclaim — rescission.*] In an action brought by the Farmers' National

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**Bank of Malone against the St. Regis Paper Company** to recover upon a negotiable promissory note made by the defendant and delivered to the Forest Land and Mill Company and transferred to the plaintiff before maturity, the defendant interposed an answer alleging, as a complete defense, that the note in suit was given in part payment for 22,500 acres of land purchased by the defendant from the Forest Land and Mill Company, and that at the time of the sale the Forest Land and Mill Company had made false representations concerning the quantity of pulp wood upon the land; that if the representations had been true the land would have been worth eight dollars an acre, but the representations being false it was worth only two dollars per acre.

*Held*, that the matter set forth in the answer did not constitute a complete defense, as the defendant could not retain the land and still refuse to pay any part of the purchase price, and that the answer was consequently demurrable;

That such matter should have been set up, if at all, by way of counterclaim or under a demand that the sale be rescinded.

**FARMERS' NAT. BANK v. ST. REGIS PAPER Co.**..... 358

7. — *Complaint alleging a special contract for services—the plaintiff may under it recover on quantum meruit.*] Where the complaint, in an action to recover for services rendered by the plaintiff to the defendant, alleges the existence of a special contract, the plaintiff may, if the evidence fails to establish the existence of a special contract, but does show that services were, in fact, rendered, recover upon a *quantum meruit*.

**SHIRK v. BROOKFIELD.**..... 295

8. — *Allegation that services were worth a certain sum—admissibility of a contract as proof of their value.*] Where the complaint alleges that the services were worth a certain sum and that the defendants had agreed to pay that sum therefor, the plaintiff is entitled to give evidence showing the nature of the services and the extent thereof, the circumstances under which they were rendered and their fair value; a contract made between the parties may also be shown in determining the value of the services. *Id.*

9. — *Occurrences since an action was begun may be set up as a partial defense in mitigation of damages.*] Where a vendor of real estate brings an action against his vendee to recover damages resulting from the action of the vendee in delivering to him, in part payment of the purchase price, a note and mortgage purporting to be signed by John Robinson and Edward F. Riley, but which had not, in fact, been signed by Riley, the vendee may, under section 508 of the Code of Civil Procedure, set forth in his answer, as a partial defense and in mitigation of damages, occurrences which took place after the action was begun and which had the effect of validating the note and mortgage and of making them enforceable securities.

**GABAY v. DOANE.**..... 413

10. — *Such defense is not limited to actions to recover damages for breach of promise to marry, or for personal injury or injury to property.*] Section 508, relative to the pleading of partial defenses, does not limit the right to interpose such defenses to actions to recover damages for a breach of promise to marry or for a personal injury or an injury to property. *Id.*

11. — *Demurrer does not lie to an answer containing a denial and new matter.*] Where a defense set forth in an answer contains new matter and denials of material allegations of the complaint, such denials may be stricken out upon motion, if the plaintiff is aggrieved thereby, but so long as they remain, a demurrer will not lie to the defense even though the other matter pleaded therein does not constitute a defense. **UGGLA v. BROKAW.**..... 310

12. — *Redundant matter merely is not demurrable.*] A demurrer will not lie to a count in an answer pleaded as a separate defense on the ground that the matter alleged therein is redundant, where such matter, if true, will defeat the action. *Id.*

13. — *A motion to strike out an entire count as redundant is proper.*] The power of the court to strike out matter as irrelevant or redundant extends to an entire count pleaded as a separate defense or counterclaim.

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*Quare*, whether the authority to strike out irrelevant or redundant matter contained in a pleading is derived from the inherent power of the court or from section 545 of the Code of Civil Procedure. *Id.*

14. — *A separate defense setting up new matter provable under preceding denials is not demurrable — allegations as to injury from material falling from a building.* The complaint, in an action to recover damages for personal injuries, alleged that the defendant was the owner of a certain building and that, while the plaintiff was driving along a public street in front of such building, he was struck by material which blew from the roof thereof. The answer admitted that the defendant owned the reversion of the premises, but denied that he owned the present existing estate therein or that he had possession, occupancy or control of the same, and put in issue the other material allegations of the complaint. The answer also set forth several separate defenses, to the second, third, fourth, fifth and sixth of which the plaintiff demurred upon the ground that they were insufficient upon the face thereof. Each of such defenses reiterated the admissions and denials contained in the preceding part of the answer, and all of them, except the sixth defense, contained the allegation that the defendant never had knowledge or notice of any defect or weakness in the construction of the building or any part thereof.

In the second defense it was alleged that for many years prior to the accident the building described in the complaint was properly and safely constructed, of the best material, by skilled and competent persons, and that it was in the exclusive occupation, care, custody and control of a tenant for years continuously thereafter.

In the third defense it was alleged that the building was erected by a tenant for years, who was in the exclusive occupation, care, custody and control of the premises at the time and so continued for many years thereafter and down to the time of the accident.

In the fourth defense it was alleged that the preparation of the plans for the construction of the building was delegated to a competent and skilled architect and engineers, and that both the defendant and his tenant relied upon such architect and engineers and were not skilled or informed in matters relating to the construction of such structures; that such architect and engineers superintended the construction and inspection of the work and materials, and that the only interference on the part of the defendant or his tenant was the signing of the contract by the tenant; that the work was delegated to competent independent contractors who undertook to supply the best materials and most skilled and careful labor.

In the fifth defense it was alleged that the accident was the direct result of "*vis major*" in that a hurricane of extraordinary violence unseated from reasonably secure fastenings the materials which injured the plaintiff," and that this result was not produced or contributed to by any faulty or defective construction.

In the sixth defense it was alleged that the injuries were caused solely through the negligence of the plaintiff.

*Held*, that the demurrer was properly overruled;

That, as each of the separate defenses contained denials of material allegations of the complaint, a demurrer would not lie thereto even though the other matter pleaded did not constitute a defense;

That the matter set forth in the several separate defenses would, if true, defeat a recovery; that the fact that none of such defenses contained any new matter, but consisted solely of matter provable under the preceding denials contained in the complaint, did not render them demurrable;

That the remedy of the plaintiff was by a motion to strike out the irrelevant or redundant matter even though such matter included the entire separate defense. *Id.*

15. — *Demurrer — it will not lie for a misjoinder of parties defendant.* A demurrer will not lie for a misjoinder of parties defendant. The phrase "defect of parties," used in subdivision 6 of section 488 of the Code of Civil Procedure, authorizing a demurrer for a defect of parties plaintiff or defendant, means a non-joinder of parties and not a misjoinder.

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16. — *Action against both an agent and his undisclosed principal—complaint not demurrable for misjoinder of two causes of action nor as not stating a cause of action against the agent.*] A complaint in an action brought against an agent and his undisclosed principal upon a contract made by the agent on behalf of such undisclosed principal states but a single cause of action, and is, therefore, not demurrable on the ground that two causes of action have been improperly united therein, nor on the ground that it does not state a cause of action against the agent. *Id.*

17. — *When the plaintiff must elect which he will hold liable.*] Assuming that, in such a case, the plaintiff is only entitled to judgment against one of the defendants and that he must elect which party he intends to hold, he cannot be required to make such election until the close of the case. The bringing of the action against both the agent and the undisclosed principal does not operate as an election to hold the undisclosed principal and not the agent.

The doctrine of election should not be applied in such a case until the debt has been satisfied by either the agent or the undisclosed principal. *Id.*

18. — *Discharge of a servant—defense that it was for good cause.*] Where a servant brings an action against his master to recover damages for his wrongful discharge, the defense that the plaintiff was discharged for good and sufficient cause is an affirmative one which must be pleaded and proved by the defendant. *SPITZ v. HEINZE*..... 317

19. — *Bill of particulars.*] The same authority exists for requiring a bill of particulars of an affirmative defense as for requiring a bill of particulars of the plaintiff's claim.

In granting a bill of particulars the court should so exercise its discretion as to avoid compelling the party required to serve the bill of particulars to make an undue disclosure of the evidence on which he relies to establish the facts in issue. *Id.*

20. — *Demurrer—not sustained on a ground not specified therein.*] If the ground of objection specified in a demurrer to a complaint is not good, the demurrer cannot be sustained because of another defect in the complaint not specified in the demurrer. *LEGGETT v. STEVENS*..... 613

21. — *When an executor has legal capacity to sue—interest of an executor's executor in the construction of the original testator's will—statement of a cause of action in equity.*] The complaint in an action brought by the executor of Minerva P. Stevens, deceased, against Addison S. Stevens, individually and as administrator with the will annexed of William P. Stevens, deceased, Helen S. Eldridge and others, alleged that William P. Stevens died leaving him surviving his wife, Minerva P. Stevens, his son, Addison S. Stevens, and an adopted child, Helen S. Eldridge; that his will provided: "*Third.* I give my wife, Minerva P. Stevens, the use of ten thousand (\$10,000) dollars for her own comfort and support, and she may use the whole principal sum of ten thousand dollars, and what is left at her death, after all her debts and funeral expenses are paid, shall be equally divided between my adopted daughter, Helen S. Eldridge, wife of Rufus C. Eldridge, if she is living; if she has children, to go to them; if not, to go to my nearest akin on my side. \* \* \*

"*Fifth.* \* \* \* I also give my wife, Minerva P. Stevens, two thousand (\$2,000) dollars in addition to the above mentioned, and on the same conditions above mentioned, that is, the use;" that Addison S. Stevens and Minerva P. Stevens were duly appointed administrators with the will annexed of the said William P. Stevens, deceased, and that, as such administrators, they paid over to Minerva P. Stevens \$12,000 in property and securities in full discharge of the legacy; that Minerva P. Stevens died while there remained in her hands of such legacy, \$7,000 in securities and \$1,500 in cash, which represented the proceeds of other securities; that she left a will by which she devised all of her property to the defendants Jepson and appointed the plaintiff sole executor thereof; that the plaintiff had duly qualified as such executor and had distributed all of the property which had come into his hands except the property which had come to his testatrix from the estate of William P. Stevens, deceased; that the defendant Addison S. Stevens, claiming as residuary legatee under the will of William

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P. Stevens, deceased, demanded that payment be made to him; that the defendant Helen S. Eldridge, also claiming to be entitled thereto under the will of William P. Stevens, deceased, demanded that all of such property be turned over to her; that the defendants Jepson, claiming under the residuary clause of the will of Minerva P. Stevens, deceased, demanded that the property be paid over to them, or that portion thereof which consisted of notes and cash.

The complaint further alleged that the plaintiff was unable to determine to which of the parties he should pay the money, and that he desired the aid and instruction of the court as to his duty in the premises.

The defendant Addison P. Stevens, both individually and as administrator with the will annexed of William P. Stevens, deceased, interposed a demurrer to the complaint on the following grounds: "*First*. That the plaintiff has no legal capacity to sue, in that he, as executor of the will of Minerva P. Stevens, deceased, has no interest in the will of William P. Stevens, deceased, or in its construction, or in the distribution of his estate. *Second*. That the said complaint does not state facts sufficient to constitute a cause of action."

*Held*, that the demurrer should be overruled;

That, as the plaintiff was duly appointed executor of the will of Minerva P. Stevens, deceased, and was acting as such at the time of the commencement of the action, he had legal capacity to sue;

That the complaint stated a cause of action of which some court had cognizance, and that the question whether the equity branch of the Supreme Court had jurisdiction was not raised by the demurrer interposed;

That, aside from the form of the demurrer, the complaint stated a cause of action of which the equity branch of the Supreme Court had jurisdiction;

That the rule that an executor of an executor has no interest in the construction of the will of the first testator does not apply in a case where the construction of the will of the first testator is necessary in order to enable the executor of the first executor to discharge the duties of his office. *Id.*

22. — *Demurrer to an answer — the sufficiency of the complaint considered thereunder.*] Upon the hearing of a demurrer to an answer the defendant may attack the sufficiency of the complaint. SCHIECK v. DONOHUE..... 321

23. — *A plea of the pendency of another action to recover the debt as a defense to a foreclosure — it must allege that it was brought without leave of the court.*] An answer, interposed in an action to foreclose a mortgage, which alleges the pendency of another action between the parties to recover the mortgage debt is demurrable, unless it also alleges that the action which it pleads in bar was brought without leave of the court. (Code Civ. Proc. § 1628.) *Id.*

24. — *Sufficiency of the allegation in a complaint that no other action was pending.*] An allegation in the complaint in a foreclosure action, "that no other action has been had for the recovery of the said sum secured by the said bond and mortgage," sufficiently complies with that provision of section 1629 of the Code of Civil Procedure which provides that the complaint "must state whether any other action has been brought to recover any part of the mortgage debt." *Id.*

25. — *Sufficiency of a tender not kept good.*] A tender of payment of the full amount due upon a bond and mortgage constitutes a good defense to an action to foreclose the mortgage, although the tender is not kept good.

A plea of tender, contained in the answer interposed in such an action, will be sustained although it is not averred that the tender has been kept good and no offer is made to pay the money into court. *Id.*

26. — *Such tender will not sustain a claim to have a mortgage annulled.*] This doctrine proceeds upon the ground that the tender discharges the lien of the mortgage, but not the mortgage debt. Consequently, where a mortgagor, who has made such a tender, seeks to have the mortgage canceled and discharged of record, he will not be granted such relief until he pays the mortgage or brings the amount thereof into court. *Id.*

27. — *When it will prevent an election to declare the principal sum due.*] Where a mortgage contains a provision that the whole of the principal sum

**PLEADING**— *Continued.*

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should become due at the option of the mortgagee, after default in the payment of interest for thirty days, and the mortgagee, acting under this clause, elects to declare the principal sum due and brings an action to foreclose the mortgage, an answer interposed in such action which alleges that the defendant duly tendered to the plaintiff the full amount of interest due him in cash, personally, and that said plaintiff deliberately and willfully refused to accept the same, and further that the defendant made a tender within the time prescribed for the payment of the interest and has ever since been ready and willing to pay the same, is not demurrable, as the averments, if true, prevented an exercise by the plaintiff of his option to treat the whole of the principal sum as due and payable. *Id.*

28. — *When a pleading may be declared to be frivolous.*] A pleading should not be declared frivolous if any argument is required to show its frivolity.

ZIMMERMAN v. MEYROWITZ. (No. 3)..... 339

29. — *When it may be stricken out as sham.*] An answer cannot be stricken out as sham unless its falsity be made to appear beyond a reasonable doubt. *Id.*

30. — *Effect of a failure to allege a material fact.*] An answer, averring matters which constitute a defense to the action, cannot be stricken out as sham simply because the defendant fails to allege therein a material fact which he had alleged in a previous answer that had been declared bad on demurrer. *Id.*

31. — *General allegations of fraud not admitted by a demurrer.*] General allegations of fraud contained in the complaint in the taxpayer's action, not accompanied by allegations of the facts constituting the alleged fraud, are not admitted by a demurrer to such complaint.

MEYERS v. PENNSYLVANIA STEEL CO. .... 307

— Life insurance — action by the insured to reform the policy and to recover its surrender value as reformed — he acts as trustee for the beneficiary — right of an assignee of the beneficiary, after the death of the insured, to be substituted as plaintiff and to serve a supplemental complaint asking for the reformation of the policy and the recovery of the amount thereby secured to be paid. HUNT v. PROVIDENT SAVINGS LIFE ASSUR. SOC. .... 338

*See INSURANCE.*

— An issue as to the ownership of a mortgage does not admit of proof that an assignment by the alleged owner was only as collateral to a debt since paid. BARSON v. MULLIGAN. .... 193

*See EVIDENCE.*

— Oral notice of dishonor of a note — an allegation that it "was sent" is not inconsistent with oral notice. KELLY v. THEISS. .... 81

*See BILLS AND NOTES.*

— An objection that a defense was not pleaded is not first available on appeal. SCHEIR v. QUIRIN. .... 634

*See NEGLIGENCE.*

— The invalidity of devises to charitable corporations must be pleaded.

GARVEY v. U. S. FIDELITY & GUARANTY CO. .... 391

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**PRACTICE** — *Reference to hear and determine — the court cannot direct that a judgment entered upon a referee's report shall contain a provision not authorized thereby, that a part of the proceeds of a sale may be secured by a bond and mortgage.*

*See SHRADY v. VAN KIRK.* .... 261

— *Revivor of a proceeding for an accounting by an executor who dies while it is pending — notice to all parties in interest — power of a surrogate, on an application to vacate an order, to grant other relief.*

*See MATTER OF TREDWELL.* .... 155

— *Findings or short decision, where an issue is joined upon an alternative mandamus — procedure on appeal in the absence thereof.*

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- *Reference — it cannot be ordered until an issue as to the existence of a partnership is first determined.*  
*See JONES v. LESTER* ..... 174
- *Reading in support of a motion an affidavit not sworn on the adverse party condemned.*  
*See CHAPUIS v. LONG* ..... 272
- *Mandamus — the existence of a remedy by action makes its granting discretionary.*  
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- *Relating to arrest.*  
*See ARREST.*
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*See COSTS.*
- *Relating to motions and orders.*  
*See MOTION AND ORDER.*
- *Relating to the granting of new trials.*  
*See NEW TRIAL.*
- *Relating to pleadings.*  
*See PLEADING.*
- *Relating to the trial of actions.*  
*See TRIAL.*
- *Relating to the probate, etc., of wills.*  
*See WILL.*

**PRESUMPTION :**

*See EVIDENCE.*

**PRINCIPAL AND AGENT** — *Agency — declarations of the agent as proof thereof.*] 1. The authority of an agent to do a specific act on behalf of a principal may be proved by the instrument creating the agency or by verbal statements of the principal showing that the principal has held the agent out to the world in other instances as having authority embracing the particular act in question; but such authority cannot be established by the unauthorized representations of the alleged agent not made in connection with some act done in performance of his duties as agent.

*LEARY v. ALBANY BREWING Co.* ..... 6

2. — *Contract not within the scope of a corporation's business — it must be authorized by the board of directors.*] A contract made by the assistant manager of a domestic brewing corporation, outside of the scope of its legitimate business, by which the brewing company agrees to pay for plumbing work done in a saloon belonging to one of its customers, is not binding upon the corporation in the absence of proof that the board of directors of the corporation authorized its assistant manager to make such a contract. *Id.*

3. — *Right of one employed to conduct a business to employ a general manager — a ratification must be, if any, in toto.*] Where the receivers of a milling corporation, being without practical knowledge of the business, employ the treasurer of the corporation to conduct such business for them, such treasurer has power to employ a general manager and to fix his compensation. In such a case the receivers must ratify or repudiate the contract made by the treasurer *in toto*, and cannot accept part thereof and reject the remainder. *SHIRK v. BROOKFIELD* ..... 295

— *Action against both an agent and his undisclosed principal — complaint not demurrable for misjoinder of two causes of action nor as not stating a cause of action against the agent — when the plaintiff must elect which he will hold liable.* *TEW v. WOLFSOHN* ..... 454  
*See PLEADING.*

**PRINCIPAL AND SURETY** — A surety on an executor's bond cannot be sued until the executor is in default.

*GARVEY v. U. S. FIDELITY & GUARANTY Co.* ..... 891  
*See WILL.*

**PROCESS**—*Service of a summons—a person who collects the dues of members of a fraternal insurance association is not a managing agent.*] Evidence that a woman residing in Brooklyn, who was the secretary of the Brooklyn branch of a fraternal insurance association, collected the dues of the members of that branch and transmitted them to the principal office of the association at Baltimore, Md., and that after the association had become insolvent and the members thereof had been transferred to the Monumental Mutual Life Insurance Company, which was incorporated under the laws of the State of Maryland and had its principal office and place of business in the city of Baltimore, she collected the premiums due from the members of the Monumental Mutual Life Insurance Company residing in her vicinity and transmitted them to the Baltimore office of that company, is insufficient to establish that she was a managing agent thereof within the meaning of section 482 of the Code of Civil Procedure authorizing the summons in an action against a foreign corporation to be served upon the managing agent thereof. *MOORE v. MONUMENTAL MUT. LIFE INS. Co* ..... 209

**PROMISSORY NOTE:**

*See* **BILLS AND NOTES.**

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*See* **EVIDENCE.**

**PROPERTY**—*Personal.*

*See* **PERSONAL PROPERTY.**

**PUBLIC POLICY**—*What contract is contrary to.*

*See* **CONTRACT.**

**PUBLIC WORKS**—*In cities.*

*See* **MUNICIPAL CORPORATION.**

**PUBLICATION**—*Of abstracts of town and county accounts.*

*See* **COUNTY.**

— *Of libel.*

*See* **LIBEL.**

**PUNITIVE DAMAGES:**

*See* **DAMAGES.**

**PURCHASE**—*Of personal property.*

*See* **SALE.**

**RAILROAD**—*Bill of lading—change of the destination of the merchandise mentioned therein—responsibility of the common carrier therefor.*] In an action brought to recover damages for the alleged negligence of the defendant in transporting a carload of eggs to New York city instead of to New Berlin, N. Y., it appeared that the defendant was a common carrier which operated no railroads but owned cars in which, pursuant to an arrangement with the railroad companies, it transported perishable property from one point to another. It did not appear to what extent the station agents of the railroad companies acted as the agents for the defendant, but it did appear that it was the practice of the station agents, when requested, to procure cars of the defendant and load and bill such cars and give notice thereof to the defendant's general agent at Chicago.

November 17, 1893, at the instance of a firm which wished to ship a carload of eggs from West Salem, Wis., to the plaintiff at New Berlin, N. Y., the station agent of the Chicago, Milwaukee and St. Paul Railway Company at West Salem, Wis., procured one of the defendant's cars. After such car had been loaded he gave the consignors a way bill stating correctly the name of the consignee and the place of the car's destination, and also notified the defendant's general agent at Chicago of the shipment. On November 19, 1893, when the car arrived at Chicago, the defendant's general agent at Chicago sent the consignors a receipt for the car stating correctly the name of the consignee and the place of destination. On the same day a clerk in the employ of the Lake Shore and Michigan Southern Railroad Company, claiming to have received a slip from the Chicago, Milwaukee and St. Paul

**RAILROAD** — *Continued.*

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Railway Company indicating that the car was consigned to New York, made out a way bill in the name of the defendant, directing the delivery of the car at New York, to which place the car was accordingly sent.

It did not appear that the defendant, after its general agent was notified from West Salem of the shipment to New Berlin, gave any directions as to the shipment from Chicago or took any steps to discover whether the destination out of Chicago was to New Berlin or elsewhere.

*Held*, that the defendant was liable for the damages resulting to the plaintiff from the shipment of the eggs to New York instead of to New Berlin;

That if the eggs did not come into the custody of the defendant at West Salem, they did at Chicago and that the defendant was responsible for all mistakes in shipment from Chicago irrespective of the question of who made the mistake. *RICHER v. FARGO*..... 550

— Assessment for the cost of altering the grade of a railroad — until the commissioners decide that some part thereof is to be assessed upon the property of individuals the latter are not entitled to review the validity of the commissioners' appointment — constitutionality of such an assessment.

*MATTER OF CITY OF NEW YORK*..... 136  
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— Street railway company in New York city — a lessee is not bound to pay to the city a license fee for each car run prior to its acceptance of the lease — effect of its taking the demised property "subject to all debts and liabilities of" the lessor. *CITY OF NEW YORK v. THIRD AVENUE R. R. CO.* 379  
*See MUNICIPAL CORPORATION.*

— Street railway company in New York city — what company, as lessee, is bound to pay to the city a license fee for each car run — the lessor, not running cars, is not.  
*CITY OF NEW YORK v. SIXTH AVENUE R. R. CO.*..... 387  
*See MUNICIPAL CORPORATION.*

— Street railway company in New York city — what company is not bound to pay to the city a license fee for each car run by it — its successor is not. *CITY OF N. Y. v. TWENTY-THIRD STREET R. CO.*..... 373  
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— Railroad — rule as to keeping an employee to warn a laborer, engaged in sweeping switches, of the approach of shunted cars.  
*CORCORAN v. NEW YORK, N. H. & H. R. R. CO.*..... 505  
*See NEGLIGENCE.*

— Railroad — action to restrain the construction of its road by an abutting owner — description in a deed — proof as to title to the fee of a highway.  
*KENNEDY v. MINEOLA, H. & F. TRACTION CO.*..... 484  
*See DEED.*

— Action to restrain the construction of a railroad — patent of land bounded on a street — when it conveys title to the center of the street.  
*PAIGE v. SCHENECTADY RAILWAY CO.*..... 571  
*See DEED.*

— *Condemnation of the right of a lessee in a city street.*  
*See EMINENT DOMAIN.*

— *Injury on.*  
*See NEGLIGENCE.*

**REAL PROPERTY** — *Dockage rights in New York city — specific performance of a contract by the city to purchase them — defense that the party agreeing to sell had no interest — construction of a reservation in a grant by the city of New York of land and dockage rights — an exception therefrom implies that an estate passed thereunder — exception void for uncertainty — what is an exercise of a reserved right precluding further action — effect of the city's consent to the construction and use of a pier — proviso in a lease as to the city's action — prescriptive right — application of "Sinking Fund Ordinance" — power of the common council to grant — implied consent from the city.*

*See BELL v. CITY OF NEW YORK*..... 437

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— *Land set off in a partition suit "as appurtenant" to each of two other lots — rights of the owners of such two lots therein — the right passes under a mortgage of a lot "together with the appurtenances."*

See *POTNAM v. PUTNAM*..... 554

— *Sale of real property after the making of an order canceling a judgment which is subsequently on appeal therefrom sustained in part — the purchaser acquires a title free therefrom.*

See *MATTER OF COLEMAN*..... 496

— *The maintenance of a leaky water closet which damages adjoining property constitutes a private nuisance — when a request to abate it or proof of knowledge is unnecessary.*

See *FINKELSTEIN v. HUNER*..... 424

— *Patent granted by the Deputy Governor of the colony of New York to an individual of land bounded on a street — when the title passes to the center line of the street.*

See *PAIGE v. SCHENECTADY RAILWAY CO.*..... 571

— *Will — provision directing a sale — presumption when it does not provide for taking back a bond and mortgage.*

See *SHRADY v. VAN KIRK*..... 261

— *Description in a deed — when it conveys title to the center of a highway.*

See *KENNEDY v. MINCOLA, H. & F. TRACTION CO.*..... 484

**RECEIVER** — *Right of one employed to conduct a business to employ a general manager — a ratification must be, if any, in toto.*] 1. Where the receivers of a milling corporation, being without practical knowledge of the business, employ the treasurer of the corporation to conduct such business for them, such treasurer has power to employ a general manager and to fix his compensation. In such a case the receivers must ratify or repudiate the contract made by the treasurer *in toto*, and cannot accept part thereof and reject the remainder. *SHIRK v. BROOKFIELD*..... 296

2. — *Proof as to the value of services.*] Where, in an action brought by the general manager against the receivers to recover for the services rendered by him, it appears that two contracts of employment were made, one with the treasurer, specifying the amount of compensation to be paid, and one with the receivers which did not specify the compensation, and the receivers repudiate, for want of authority, the contract of employment made by the treasurer, such contract is competent proof upon the value of the services rendered by the plaintiff, as is also the testimony of skilled experts having knowledge of the business and of the value of the services rendered by the plaintiff. *Id.*

3. — *Competency of conversations with one of two receivers.*] The receivers having entered into a contract of employment with the plaintiff, conversations had by the plaintiff with either or both of the receivers with respect to the subject-matter of the services and the compensation to be paid therefor are competent. *Id.*

4. — *Accounting by receivers of moneyed corporations — chapter 60 of the Laws of 1902 is applicable to receiverships created prior to its passage.*] Chapter 60 of the Laws of 1902, which regulates accountings by receivers of moneyed corporations, affects the procedure only, and it was competent for the Legislature to make such statute applicable to accountings by receivers who had been appointed prior to its passage. *PEOPLE v. MANHATTAN FIRE INS. CO.* 517

— *Costs — liability therefor, of a judgment creditor who secures the appointment of a receiver of his debtor's property and requests the receiver to bring an action to recover it, in which a judgment for costs is recovered against him.* *DROEGE v. BAXTER*..... 78

See **COSTS**.

**REDUNDANT MATTER — In a pleading.**

See **PLEADING**.

**REFERENCE** — *Will* — provision directing a sale — presumption when it does not provide for taking back a bond and mortgage — reference to hear and determine — the court cannot direct that a judgment entered upon the referee's report shall contain a provision, not authorized thereby, that a part of the proceeds of a sale may be secured by a bond and mortgage — remedy where such a provision is inserted.]

1. A will, which directed the testamentary trustees to sell the testator's realty, was silent as to whether the sale should be made wholly for cash or partly on bond and mortgage. In an action brought by a beneficiary under the will to compel the sale of the real estate and to obtain other relief, the issues were referred to a referee to hear and determine. The referee filed a report directing a sale of the realty, but did not specify whether the sale should be made for cash or on credit. After the filing of the referee's report the referee approved, as to form, a judgment which recited that the realty should be sold in separate parcels "with the privilege of allowing sixty per cent of the purchase money to remain on bond and mortgage for two years." Thereafter the court at Special Term directed the entry of a judgment in conformity with that approved by the referee. The plaintiff then moved to correct the judgment by striking therefrom the provision that sixty per cent of the purchase money might remain on bond and mortgage for two years.

Upon an appeal from an order denying such motion, it was

*Held*, that the referee was *functus officio* when he approved, as to form, the proposed judgment submitted to him;

That the failure of the will to authorize a sale on bond and mortgage raised a presumption that it was the intention of the testator that the property should be sold for cash;

That, as the referee in his report had simply directed a sale of the real estate and thus followed practically the language of the will, it would be presumed that it was his view that the sale should be made solely for cash;

That the court had no power to insert the provision that a portion of the purchase money should remain on bond and mortgage for two years, as such provision was substantially different from that prescribed in the referee's report. *SHRADY v. VAN KIRK*..... 261

2. — *It cannot be ordered until an issue as to the existence of a partnership is first determined.*] Where the complaint, in an action for an accounting, alleges that the parties were copartners and the answer denies the existence of the partnership, an order of reference cannot be granted, under section 1018 of the Code of Civil Procedure, until the issue as to the existence of the partnership has been first determined. *JONES v. LESTER*..... 174

3. — *The reopening of a case is discretionary.*] A motion, made upon a reference after the evidence had been closed, to allow the plaintiff's case to be reopened and permit him to offer additional evidence in chief, is addressed to the discretion of the referee.

*OCCOR & RUGG CO. v. CITY OF LITTLE FALLS*..... 592

**REMEDY** — *Existing in the relation of husband and wife.*

*See* HUSBAND AND WIFE.

**REPRESENTATION** — *Fraudulently made.*

*See* FALSE REPRESENTATION.

— *In contracts for the sale of personal property.*

*See* SALE.

**RESCISSION** — *Of sales of personal property.*

*See* SALE.

**REVISED STATUTES:**

*See* STATUTE.

**REVIVAL** — *Of action.*

*See* ABATEMENT AND REVIVOR.

**ROAD:**

*See* HIGHWAY.



**ROCHESTER**—*Tax upon personality—remedy where other parties liable to assessment have been omitted from the rolls—what objections can be raised in proceedings to collect a tax—necessity of affixing seals to assessment rolls—acts to legalise taxes and local assessments—when unconstitutional.*

*See* MATTER OF CITY OF ROCHESTER *v.* BLOSS..... 28

**RULE**—*Of practice.*

*See* COURT.

**SALE**—*Of merchandise on credit—counterclaim existing in favor of the vendor against the vendee, when not enforceable against the assignee of the latter—provision that the "contract is not contingent upon any other and is to be settled between the buyer and the seller"—it has no effect on assignability.]* In an action to recover damages for the refusal of the defendants to deliver certain coffee to the plaintiffs upon demand, it appeared from the complaint that on August 10, 1901, the defendants sold the firm of Jones & Co. a thousand bags of coffee, to be thereafter shipped, on a basis of five and seven-eighths cents per pound for standard No. 7. The coffee was to average in grade about standard No. 7, and any difference either above or below such standard was to be paid or allowed by the buyer or seller, as the case might be.

The contract provided that "this contract is not contingent upon any other and is to be settled between the buyer and seller mentioned herein, without reference as to gradings or otherwise to any other contracts." It also provided that the invoice should date from the time when the coffee should all be in store and that the coffee should be paid for within thirty days from the date of invoice, discount at the rate of eight per cent per annum to be allowed on the basis of ninety-day notes paid in cash before maturity.

The complaint further alleged that on September 28, 1901, Jones & Co. sold the plaintiffs the thousand bags of coffee which they had bought from the defendants; that, with the exception of the price, the terms of the contract between Jones & Co. and the plaintiffs were the same as those of the contract between the defendants and Jones & Co. The coffee arrived in the city of New York on October 7, 1901. On October 23, 1901, the gradings, by which the price of the coffee was to be determined, were completed, and on October 24, 1901, the coffee had all been placed in store.

On October 25, 1901, Jones & Co. made an assignment for the benefit of creditors, and the assignee soon afterwards transferred to the plaintiffs whatever interest Jones & Co. had in the contract with the defendants. On October 30, 1901, the plaintiffs tendered to the defendants a sum of money greater than the purchase price of the coffee under the contract of August 10, 1901, and demanded a delivery of the coffee, but the defendants refused to comply with such demand.

The defendants, acting under subdivision 1 of section 502 of the Code of Civil Procedure, which provides that if the action is founded upon a contract, which has been assigned by the party thereto, a demand existing against the party thereto, at the time of the assignment thereof, must be allowed as a counterclaim to the amount of the plaintiff's demand, if it might have been so allowed against the party while the contract belonged to him, interposed certain counterclaims existing against Jones & Co. based upon differences arising out of gradings had pursuant to other contracts. The demands sought to be counterclaimed did not arise until Jones & Co. had become insolvent.

*Held*, that the counterclaims were demurrable, as the title to the coffee had passed from the defendants to Jones & Co., and from Jones & Co. to the plaintiffs, before the defendants' right to insist upon their demands against Jones & Co. arose;

That, as the contract of August 10, 1901, contemplated the giving of credit for the purchase price, it could not be said that the title to the goods did not pass until they were paid for;

That the provision in the contract between the defendants and Jones & Co., providing, "this contract is not contingent upon any other, and is to be settled between the buyer and seller mentioned herein, without reference as to gradings or otherwise to any other contracts," did not militate against this construction or restrict the assignability of the contract or the right of Jones & Co. to resell the coffee before payment or delivery.

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— Lien of a manufacturer who is not required to make delivery before payment—when, although the contract is entire, the lien does not cover the product manufactured before default—the giving of credit operates as a waiver of the lien. *BLUMENBERG PRESS v. MUTUAL MER. AGENCY*... 87

See LIEN.

— Transfer of a stock certificate after the announcement of a decision and before entry of judgment for its recovery against the transferrer—when such judgment is admissible against the transferee—effect thereof.

*PRINTING TEL. NEWS CO. v. BRANTINGHAM* ..... 280

See EVIDENCE.

— Action to recover the purchase price of land—false representations on the sale should be set up, if at all, by way of counterclaim or under a demand that the sale be rescinded.

*FARMERS' NAT. BANK v. ST. REGIS PAPER CO.* ..... 558

See PLEADING.

— The cost of store fixtures as evidence of value.

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— Power of, by executors.

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**SALVAGE:**

See SHIPPING.

**SAVINGS BANK:**

See BANKING.

**SAVINGS AND LOAN ASSOCIATION**—*Insolvent savings and loan association—borrowing shareholders relieved from their contracts as of the date of the appointment of the receivers.* 1. When a savings and loan association becomes insolvent and passes into the hands of receivers and is no longer able to carry out its contract with the borrowing shareholders, all of such borrowing shareholders should be relieved from their contracts with the association as of the date on which the receivers were appointed and an equitable adjustment should then be made. *RIGGS v. CARTER*..... 580

2. — *Approximate value of a shareholder's stock, to be applied in reduction of a mortgage given by him.* In an action brought by the receivers of the association against a borrowing shareholder to foreclose the mortgage executed by him, the court is not, in the absence of any proof upon the subject or any request in regard thereto, required to approximately determine the value of the shareholder's stock to the end that he may be relieved from his mortgage to the extent of his interest in the assets of the association. *Id.*

**SCHOOL**—*Contract to erect a school building in the city of Little Falls—its board of education is not a corporation—the city is liable on contracts made by the board.*

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<i>See</i> ROGERS v. BOARD OF SUPERVISORS .....	501
—1895, chap. 79— <i>Improvement of the Erie canal under the act of 1895—it was abandoned, not suspended—the State was not authorized by the contracts to abandon it—right of the contractors to recover damages for the breach.</i>	
<i>See</i> BAKER v. STATE OF NEW YORK .....	528
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—1896, chap. 908— <i>Tax upon personality—remedy where other parties liable to assessment have been omitted from the rolls.</i>	
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—1897, chap. 378, § 707-712— <i>Conviction for vagrancy in the boroughs of Manhattan and the Bronx—constitutionality of the provisions for the prisoner's earlier discharge in case of his not having been previously convicted.</i>	
<i>See</i> PEOPLE EX REL. ABRAMS v. FOX .....	245
—1897, chap. 378, § 735— <i>Municipal corporation—unexplained absence of a member of the fire department of New York city—what must be shown in the return to a mandamus to procure his reinstatement.</i>	
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- 1897, chap. 878, § 998 — *Fees of commissioners of estimate and assessment in the city of New York—what proof as to the number of days consumed must be furnished—charges for meetings at which nothing is done.*  
*See* **MATTER OF CITY OF NEW YORK** ..... 488
- 1897, chap. 415 — *Incorporation in a public contract of unconstitutional provisions of the Labor Law—its execution not enjoined at the suit of a taxpayer.*  
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- 1901, chap. 486 — *Fees of commissioners of estimate and assessment in the city of New York—what proof as to the number of days consumed must be furnished—charges for meetings at which nothing is done.*  
*See* **MATTER OF CITY OF NEW YORK**..... 493
- 1901, chap. 486 — *Conviction for vagrancy in the boroughs of Manhattan and the Bronx—constitutionality of the provisions for the prisoner's earlier discharge in case of his not having been previously convicted.*  
*See* **PEOPLE EX REL. ABRAMS v. FOX**..... 245
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- SET-OFF** — Action for the purchase price of land—false representations on the sale should be set up, if at all, by way of counterclaim or under a demand that the sale be rescinded.  
**FARMERS' NAT. BANK v. ST. REGIS PAPER CO.**..... 558  
*See* **PLEADING**.
- Sale of merchandise on credit—counterclaim existing in favor of the vendor against the vendee, when not enforceable against the assignee of the latter. **BAYNE v. HARD**..... 251  
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**SHAM PLEADING :**

*See* **PLEADING**.

**SHIPPING** — *Bill of lading—when the burden of proof as to when a loss of part of the goods covered by the bill occurred, rests on the carrier issuing it—conditions limiting the carrier's liability.* 1. In an action brought by Alfred Fasy and his wife against the International Navigation Company to recover the value of a sealskin sack, it appeared that the plaintiffs delivered a trunk containing such sealskin sack to the agents of the defendant at Basle, Switzerland, for transportation to New York. The bill of lading provided that the trunk should be delivered at New York to "The International Navigation Co., New York, for disposal of Dr. Wells, Esq., Richmond Hill, Long Island, or to his or their assigns." On the arrival of the trunk in New York the defendant, without giving the consignee or the plaintiffs an opportunity to see or examine the trunk or take it in charge for the purpose of entry, sent it to the custom house and, after it had been released, forwarded the trunk to the plaintiffs at Richmond Hill through an express company chosen by it. When the trunk was opened the sealskin sack was found to be missing.

*Held*, that, as the defendant had deprived the plaintiffs of their right to examine the trunk at the place of delivery designated in the contract, the

**SHIPPING — Continued.**

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burden of proof as to when the loss of the sack occurred was thereby shifted, and that the defendant was called upon to show whether or not the loss occurred while the trunk was in its actual custody:

That conditions in the bill of lading limiting the liability of the defendant could not be regarded as exempting the defendant from liability for negligence. *FASY v. INTERNATIONAL NAVIGATION CO.* ..... 469

2. — *Salvage* — an action for, does not lie in a State court — a State court has jurisdiction where services have been rendered to a stranded barge under a contract.] A State court has no jurisdiction of an action brought to recover upon a marine contract for salvage; such a court has, however, jurisdiction of an action brought by a wrecking company against the owner of a barge which had gone ashore on the coast of Long Island, to recover the value of work, labor and services rendered by the wrecking company, pursuant to a contract with such owner, in floating the barge and taking it to the port of New York, although the wrecking company might, in the absence of a contract, have been entitled to a claim for salvage for the services rendered.

*MERRITT & CHAPMAN DERRICK & W. Co. v. TICE.* ..... 336

— *Insurance on a vessel.*

See *INSURANCE.*

**SHORT CAUSE CALENDAR:**

See *CALENDAR.*

**SOCIETY — To effect insurance.**

See *INSURANCE.*

**SPECIFIC PERFORMANCE** — Of a contract, alleged to have been made by one since deceased, to devise a house to a relative in consideration of the latter's agreement to care for her. *BRAUN v. OCHS.* ..... 20

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— Dockage rights in New York city — specific performance of a contract by the city to purchase them — defense that the party agreeing to sell had no interest. *BELL v. CITY OF NEW YORK.* ..... 437

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See *BAKER v. STATE OF NEW YORK.* ..... 538

**STATUTE** — When a failure to obey a statutory provision as to contracting a city debt is not available to the city as a defense to such a contract.

See *OCORR & RUGG CO. v. CITY OF LITTLE FALLS.* ..... 592

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**STATUTE OF FRAUDS:**

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**STATUTE OF LIMITATIONS:**

See *LIMITATION OF ACTION.*

**STOCK — In corporations.**

See *CORPORATION.*

**STOCK CERTIFICATE** — Bona fides of a transfer thereof.

See *EVIDENCE.*

**STREET RAILROAD:**

See *RAILROAD.*

**SUMMONS:**

See *PROCESS.*

**SUNRISE AND SUNSET** — Judicial notice as to the time of.

See *EVIDENCE.*

**SUPPLEMENTAL COMPLAINT:**

*See* PLEADING.

**SURETY:**

*See* PRINCIPAL AND SURETY.

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**SURROGATE**—*Revivor of a proceeding for an accounting by an executor who dies while it is pending — notice to all parties in interest — power of a surrogate, on an application to vacate an order, to grant other relief.*] A proceeding by Effingham H. Nichols for a judicial settlement of his accounts, as executor under the will of Seabury Tredwell, deceased, abated by the death of the said Nichols. Thereafter Samuel Lenox Tredwell, individually and as trustee under the will of Seabury Tredwell, deceased, and as administrator with the will annexed of Seabury Tredwell, deceased, upon notice to all the parties interested, obtained an order directing Nichols' executors to file an account of their testator's proceedings as executor of Seabury Tredwell, deceased. While this accounting was pending, Nichols' executors obtained an *ex parte* order reviving the proceeding for an accounting instituted by their testator.

Upon the return of the citation to attend such revived accounting, issued pursuant to the *ex parte* order, the surrogate, upon a motion made, under a citation returnable the same day as the citation issued under the *ex parte* order, by Samuel Lenox Tredwell, individually and in his capacity as trustee and as administrator with the will annexed, to vacate the *ex parte* order, held that, while the order reviving the proceedings should not have been granted *ex parte*, all the parties being then before the court, the order of revival could be granted, and for that reason refused to vacate the *ex parte* order.

*Held*, that all the parties interested in the estate were entitled to notice of any application to revive the original accounting, particularly as the question whether the surrogate had power to revive such proceeding was not free from doubt;

That the surrogate had no power to turn the application to vacate the *ex parte* order into one to revive the proceeding and grant the motion for revival, but that he should have vacated the *ex parte* order.

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*See* EXECUTOR AND ADMINISTRATOR.

**TAX**—*Transfer tax — an ante-nuptial transfer and a retransfer in trust held not to be subject thereto — the construction of the ante-nuptial transfer is not affected by a subsequent will.*] 1. By an ante-nuptial agreement, bearing date April 7, 1898, Charles Miller assigned to Gertrude B. Tefft, his intended wife, 2,000 shares of the stock of a corporation. By an agreement entered into between Miller and Miss Tefft, bearing date April 8, 1898, Miss Tefft reassigned the stock to Miller upon trust "to invest and re-invest the same in the purchase of real or personal property, and to change the investments as he may in his discretion, subject to the approval of the said party of the first part (Miss Tefft), think most advantageous, \* \* \* and to receive, appropriate and apply to the mutual use of the parties to these presents the interest and income arising therefrom during the joint lives of said parties."

The agreement of April eighth further provided: "Upon the death of either of the parties hereto the trust hereby created shall terminate and come to an end; and in case the party of the first part should first die, leaving the party of the second part (Miller) surviving her, the said property hereinabove granted and assigned, and the investments representing the same, shall thereupon become and be the absolute property of the party of the second part, freed from all trusts and conditions whatsoever; and in case the party of the second part should first die, leaving the party of the first part surviving him, then and in that case, the said property and the said investments representing the same, shall revert to the said party of the first part, and she hereby reserves the same in that event to herself in absolute ownership, free from all trusts and conditions whatsoever."

The contemplated marriage took place on April 8, 1898, subsequent to the execution of the instruments. Miller died January 19, 1901, leaving a will dated January 17, 1900, which contained the following provision: "*Second* :

**TAX—Continued.**

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Whereas I have heretofore set apart and transferred to my wife Gertrude Benchley Miller two thousand (2,000) shares of the capital stock of the Phoenix Horse Shoe Company of Illinois of the par value of two hundred thousand dollars (\$200,000), which stock I now hold under a certain deed of trust executed by my said wife to use (*sic*), bearing date the 7th day of April, 1898, I do hereby reaffirm the said transfer and do give and bequeath all the right, title and interest I may have, if any, in and to the said two thousand (2,000) shares of stock and in and to all the property in which the same may stand invested under the said trust deed at the time of my death, to my said wife absolutely."

The surrogate decided, upon the documentary evidence alone, that the agreements of April seventh and eighth were contemporaneous, and were made in contemplation of the death of Miller, and determined that the transfer of the stock was subject to a transfer tax.

*Held*, that the decree should be reversed;

That it was incumbent upon the State to prove the facts justifying the imposition of the transfer tax;

That, as the transfers from Miller to Miss Tefft and from Miss Tefft to Miller bore different dates, the presumption was that they were separate and distinct instruments, executed on the days of their respective dates, and that, in the absence of any evidence to the contrary, the surrogate was not justified in finding that such agreements were contemporaneous and parts of one transaction;

That the ante-nuptial agreement of April 7, 1898, was based upon a valuable consideration, and operated to confer on Miss Tefft the absolute ownership of the stock;

That the transfer effected by such instrument was not subject to the transfer tax, and was not rendered subject thereto by the agreement of April 8, 1898;

That the will of Charles Miller, considered as an act or declaration of his, could not affect the construction of the ante-nuptial transfer.

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2. — *Assessment of real property in New York city—a review thereof rests upon the application made to the assessors—what does not establish an overvaluation—what is not a statement that the property is assessed for more than the sum for which it would sell—unrented space, not considered.* [An owner of property located on Fulton street in the city of New York which had been assessed for the year 1901 at the sum of \$125,000, presented an application pursuant to section 895 of the Greater New York charter (Laws of 1897, chap. 878) for a reduction of the assessment. The application alleged that in the year 1898 the premises rented for \$23,365, and that in 1899 and 1900 the rents fell to \$19,266, and that the value of the unrented space exceeded \$1,000; that assuming the real value of the property to be \$125,000 the average net income thereof was one and three-tenths per cent of such value; that in 1899 the assessed valuation of the premises was \$90,000; that in 1900 it was \$108,000. The application further stated that the assessment was unjust and unreasonable; that the value of the property in Fulton street had declined for several years and requested that the assessment be reduced to the sum of \$75,000, which the applicant stated was a fair and reasonable valuation of the premises.

The tax commissioners having denied the application, the property owner sued out a writ of certiorari to review their action. The petition for the writ set out the application in full, and submitted, in addition thereto, a table setting forth the assessed value of several pieces of property in the vicinity and claimed that a comparison of such property with the property of the relator would show that the assessment was disproportionate and unequal. Such table did not disclose the market value of the relator's property nor that of the properties with which it was sought to be compared.

*Held*, that the relator must stand or fall in the certiorari proceedings upon the case made by him in the application to the tax commissioners;

That neither the application nor the petition for the writ of certiorari established a case of overvaluation;

That the statement in the application that \$75,000 was "a fair and reasonable valuation" of the premises was not an allegation that the premises

**TAX** — *Continued.*

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were assessed for a sum greater than that for which the property would sell under ordinary circumstances;

That in determining the assessed value of the premises the unrented space could not be taken into consideration.

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3. — *What is not "doing business" in the State of New York.*] A corporation organized under the laws of the State of Colorado and having its principal place of business in that State, was authorized to do business in the State of New York and had an office in the city of New York. The New York office was maintained for the sole purpose of enabling the directors of the corporation to meet in it and declare dividends upon its stock. No goods of the corporation were sent to or sold in New York, and it had no bills receivable in New York, and the only assets which it had in that State were its office furniture and money on hand and in bank which had been sent from its principal office to its New York office for the purpose of paying dividends.

*Held*, that the corporation was not "doing business" in the State of New York within the meaning of section 7 of the Tax Law (Laws of 1896, chap. 908). PEOPLE EX REL. DIVES-PELICAN CO. v. FEITNER..... 189

4. — *Transfer tax—the right acquired by the legal representatives of a decedent in a Stock Exchange seat held by him is not subject thereto.*] The right to a seat in the New York Stock Exchange, which belonged to a decedent during his lifetime and which passed to his personal representatives at his death, is not subject to a transfer tax under sections 220 and 221 of the Tax Law, as such a right is not "personal property" within the meaning of that term as defined by subdivision 5 of section 2 of the Tax Law.

All that passes to the decedent's personal representatives in such a case is the right to a transfer of the decedent's seat subject to the rules of the Stock Exchange, and not the capital invested in the purchase of the seat or the value thereof at the time of the decedent's death.

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5. — *Upon personality—remedy where other parties liable to assessment have been omitted from the rolls.*] The remedy of a person, assessed by the assessors of the city of Rochester for personal property, who is displeased with the action of the assessors in omitting from the assessment roll other persons taxable for personal property, is by certiorari proceedings under chapter 908 of the Laws of 1896. He cannot raise that objection in a proceeding for the collection of the tax instituted against him under section 82 of the city charter (Laws of 1880, chap. 14, as amd. by Laws of 1890, chap. 561). MATTER OF CITY OF ROCHESTER v. BLOSS..... 28

6. — *What objections can be raised in proceedings to collect a tax.*] When the taxing officers were without jurisdiction to impose an assessment, the assessment is void and its invalidity may be asserted in any proceeding to collect the tax. *Id.*

7. — *Necessity of affixing seals to assessment rolls.*] The requirement as to the affixing of a seal contained in section 86 of the charter of the city of Rochester, which provides that the warrant for the collection of taxes shall be issued under the hand of the mayor and the seal of the city of Rochester, is mandatory, and a warrant issued under the hand of the mayor without the seal of the city is void and payment of the taxes cannot be enforced. *Id.*

8. — *Acts to legalize taxes and local assessments—when unconstitutional.*] Chapter 200 of the Laws of 1901 and chapter 719 of the Laws of 1901, entitled respectively, "An act to amend the charter of the city of Rochester relative to expenses incident to improvements," and "An act to amend \* \* \* and to consolidate therewith the several acts in relation to the charter of said city relative to expenses incident to improvements," by which the Legislature has sought to legalize every general tax or local assessment upon any real or personal property in the city of Rochester, violate section 16 of article 3 of the State Constitution, which provides, "No private or local bill, which may be passed by the Legislature, shall embrace more than one subject, and that shall be expressed in the title." *Id.*



**TAXPAYER**— *Temporary injunction granted to a taxpayer — when it will not be disturbed.*] 1. In a taxpayer's action the Special Term may, in the exercise of its discretion, properly grant the plaintiff a temporary injunction, and the Appellate Division will not disturb such injunction upon appeal unless it appears on an examination of the complaint that the taxpayer is clearly and certainly not entitled to the ultimate relief which he seeks.

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2. — *Peculiar injury need not be shown.*] The plaintiff, in a taxpayer's action, is not obliged to show that he will suffer peculiar injury from the act which he seeks to enjoin; it is enough for him to show that he has the status of a taxpayer which the statute prescribes and that the act of the defendant is one which the law forbids. *Id.*

— Incorporation in a public contract of unconstitutional provisions of the Labor Law — its execution not enjoined at the suit of a taxpayer.

MEYERS v. PENNSYLVANIA STEEL CO. . . . . 307  
See CONTRACT.

**TENDER**— *Of payment.*

See PAYMENT.

**TOWN**— *Bridge in Columbia county — the town of Ghent, not the town of Kinderhook, must repair it.*] 1. While chapter 91 of the Laws of 1818, by which act and the proceedings taken thereunder the town of Kinderhook in the county of Columbia was relieved from the duty of maintaining a certain bridge and such duty was imposed upon the town of Ghent in that county, was repealed by subdivisions 128 and 549 of section 1 of chapter 21 of the Laws of 1828 (second meeting), the rights and liabilities of the two towns in respect to such bridge were preserved by the saving clause contained in section 5 of the act of 1828 which provides: "The repeal of any statutory provision by this act shall not affect any act done or right accrued or established, or any proceeding, suit or prosecution had or commenced in any civil case previous to the time when such repeal shall take effect, but every such act, right and proceeding shall remain as valid and effectual as if the provision so repealed had remained in force." MATTER OF WEBSTER. . . . . 560

2. — *Unauthorized publication of abstracts of town and county accounts.*] Section 51 of the County Law (Laws of 1892, chap. 686) and section 170 of the Town Law (Laws of 1890, chap. 569), relative to the publication of the abstracts of town and county accounts, contemplate that all the abstracts shall be grouped together in a single publication.

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3. — *Payment therefor restrained.*] The practice of publishing portions of the town abstracts in different newspapers throughout the county is unauthorized, and a taxpayer of the county is entitled to an injunction restraining the payment of bills incurred for such publications. *Id.*

4. — *Good faith no defense.*] The fact that the publications were made in good faith and in accordance with a custom which had been established in the county does not entitle the newspaper publishers to receive payment therefor, as they are bound to know the limitations imposed upon the powers of the county officials. *Id.*

— *Highways in.*

See HIGHWAY.

**TRANSFER TAX:**

See TAX.

**TRIAL**— *Action to determine the validity of the probate of a will — testimony of physicians based upon a diagnosis of incipient paresis made by one of them three years before the testator's death and contradicted by his subsequent conviction — it does not require the submission of the case to the jury.*

See PHILIPS v. PHILIPS. . . . . 113

— *Evidence — testimony given on another trial used by the party calling a witness to discredit him as to matter called out by the adverse party — striking*

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out competent evidence — not a ground of reversal unless the evidence was beneficial to the party complaining thereof.	
See HUBNER v. METROPOLITAN STREET R. Co.	290
— Negligence — refusal to charge that "if the plaintiff failed to look for an approaching car and was struck by one as soon as he put one foot upon its track" he was negligent, held to be error — exceptions to a charge, when sufficient.	
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— Negligence — charge as to the act of a boy in running upon a street railway track — proximate cause of injury.	
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— Proof proper on the direct case is admissible in rebuttal only in the discretion of the court.	
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— Evidence, although considered unreliable by the court, must be submitted to the jury.	
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— The jury are not to speculate as to what else should be done.	
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— Form of exceptions to a charge, when sufficiently specific.	
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**TRUST** — Created by the assignment of mortgages to protect a vendor who has conveyed with warranty a part of the mortgaged premises — a subsequent assignment by the administrator of the mortgagee does not terminate the trust — the assignee cannot foreclose the mortgages to the prejudice of such vendor — rights of the latter's vendees.] In April, 1883, Marquis A. Lasher purchased a farm and gave a purchase-money mortgage thereon. In July, 1883, he executed to his brother, Allen Lasher, two other mortgages upon the farm for \$2,500 and \$400 respectively. Thereafter he conveyed the premises to Samuel Decker, a son-in-law of Allen Lasher, the consideration being the mortgages thereon.

In 1887 Samuel Decker sold certain parcels of the farm to one Rost and executed warranty deeds thereof. In 1889 the lands so conveyed to Rost were released from the lien of the purchase-money mortgage. In July, 1891, Allen Lasher assigned to his daughter, Mary Decker, the wife of Samuel Decker, the two mortgages held by him by an instrument containing the following clause: "This assignment is made to protect the said party of the second part hereto and her husband Samuel Decker, either or both, from any and all liability incurred by them or either of them on account of any deeds given by them for any portion of the Elwood farm, and also on condition that when any other or more deeds are given for any unsold portion of said farm, then the party of the second part will execute releases from the mortgages hereby assigned on condition the purchase money is applied on either the Elwood mortgage or the mortgages hereby assigned." In November, 1892, Allen Lasher died intestate, and on December 8, 1893, Samuel Decker, as administrator of the estate of Allen Lasher, assigned to his wife, Mary Decker, such interest as Allen Lasher still had in the mortgages by an instrument containing the following clause: "The intention herein being to convey to said Mary Decker any interest the estate of said deceased may have in the said two bonds and mortgages."

**TRUST** — *Continued.*

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Thereafter Mary Decker assigned the two mortgages to Alvin Richtmyer, who brought an action to foreclose such mortgages.

*Held*, that the assignment of the mortgages in suit executed by Allen Lasher operated to create a trust for the benefit of Samuel Decker, to protect him upon the covenants of warranty in the deeds theretofore made by him, and to preserve the purchase moneys thereafter received as a fund for the satisfaction of the liens upon the farm;

That, after the execution of the assignment by Allen Lasher, the latter retained no interest in the mortgages, and that, consequently, the assignment from the administrator of Allen Lasher's estate to Mary Decker did not confer any additional rights on Mary Decker, or operate as a waiver by Samuel Decker of his individual rights in the trust created for his benefit;

That, under the assignment from Allen Lasher, Mary Decker had no power to foreclose the mortgages assigned to her as against the lots sold to Rost;

That as such assignment had been recorded and as the consideration for the assignment to Richtmyer was an antecedent indebtedness, Richtmyer took the mortgages in suit impressed with the same trust upon which Mary Decker held them and could not enforce them to the injury of Samuel Decker;

That the persons taking title from Rost under warranty deeds were entitled to enforce the trust created by the assignment from Allen Lasher to Mary Decker, and that Richtmyer could not enforce the mortgages assigned to him as against them. *RICHTMYER v. LASHER*..... 574

— A savings bank deposit made "in trust" for another — an implication arises therefrom, in the absence of proof to the contrary, of an intention to create a trust — it is not rebutted by the fact that the money is subsequently withdrawn. *JENKINS v. BAKER*..... 509

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— Life insurance — action by the insured to reform the policy and to recover its surrender value as reformed — he acts as trustee for the beneficiary. *HUNT v. PROVIDENT SAVINGS LIFE ASSUR. SOC.*..... 338

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— Attachment — not leviable upon the equitable interest of a beneficiary in a trust. *FISKE v. PARKE*..... 422

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**UNITED STATES STATUTES AT LARGE** — *Vol. 30, p. 563, § 60* — *Transfer by a bankrupt — what must be shown to establish that it was fraudulent as to creditors — exceptions to a charge, when not sufficiently definite.*

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**VAGRANCY** — *Conviction for vagrancy in the boroughs of Manhattan and the Bronx — constitutionality of the provisions for the prisoner's earlier discharge in case of his not having been previously convicted.*

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*See* TRUST.

**VENDOR AND PURCHASER** — *Continued.*

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— Sale of real property after the making of an order canceling a judgment which is subsequently on appeal therefrom sustained in part — the purchaser acquires a title free therefrom. *MATTER OF COLEMAN* ..... 496  
*See JUDGMENT.*

— Patent granted by the Deputy Governor of the colony of New York to an individual of land bounded on a street — when the title passes to the center line of the street. *PAIGE v. SCHENECTADY RAILWAY CO.* ..... 571  
*See DEED.*

— Description in a deed of property abutting on a highway — when it does not convey title to the center of the highway.  
*KENNEDY v. MINEOLA, H. & F. TRACTION CO.* ..... 484  
*See DEED.*

— Will — provision directing a sale — presumption when it does not provide for taking back a bond and mortgage. *SHRADY v. VAN KIRK* ..... 261  
*See WILL.*

**VENUE** — *Of an action affecting real estate and personally where none of the parties reside in the county where the real estate is.*] 1. The venue of an action affecting the title to "a large amount of real and personal property, consisting of houses and lands in the City and County of New York, in the State of New York, and in the City and Town of Bridgeport, in the State of Connecticut, and elsewhere, and of goods, chattels and money and securities for money in the States of New York and Connecticut and elsewhere," is properly laid in New York county under the provisions of section 982 of the Code of Civil Procedure, although the complaint does not show whether any of the parties reside in that county. *HALL v. GILMAN*. (No. 2)..... 464

2. — *Change of* — "party" in the Code of Civil Procedure, § 984, defined.] The word "party," used in section 984 of the Code of Civil Procedure, which provides that certain actions shall be tried in the county in which one of the parties resides, only applies to the parties to the record, and the residence of persons who are not parties to the record, but who are the real parties in interest, cannot be considered. *LANE v. BOCHLOWITZ*..... 171

3. — *Convenience of witnesses.*] In determining whether the venue of an action should be changed for the convenience of witnesses, the convenience of the witnesses whose testimony will be material and competent can alone be considered. *Id.*

**VERBAL AGREEMENT:**

*See CONTRACT.*

**VESSEL:**

*See SHIPPING.*

**VINDICTIVE DAMAGES:**

*See DAMAGES.*

**WAIVER** — *Services of a commissioner of deeds employed by the city of New York in taking affidavits of city inspectors — a waiver of the right to compensation may be established by implication.*

*See ROURKE v. CITY OF NEW YORK* ..... 72  
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— *Of an architect's certificate by a municipal corporation taking possession of a building for the purpose of completing the same.*  
*See OCORR & RUGG CO. v. CITY OF LITTLE FALLS* ..... 592

— *The giving of credit operates as a waiver of a manufacturer's lien.*  
*See BLUMENBERG PRESS v. MUTUAL MER. AGENCY*..... 87

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**WHARF** — Dockage rights in New York city — specific performance of a contract by the city to purchase them — defense that the party agreeing to sell had no interest — construction of a reservation in a grant by the city of New York of land and dockage rights — an exception therefrom implies that an estate passed thereunder — exception void for uncertainty — what is an

**WHARF** — Continued.

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exercise of a reserved right precluding further action — effect of the city's consent to the construction and use of a pier — proviso in a lease as to the city's action — prescriptive right — application of "Sinking Fund Ordinance" — power of the common council to grant — implied consent from the city. **BELL v. CITY OF NEW YORK**..... 437

See **MUNICIPAL CORPORATION**.

**WILL** — *Heir at law claiming that a will admitted to probate was invalid because of her ancestor's incapacity — the invalidity of devises to charitable corporations must be pleaded — right of an heir at law, where there is an equitable conversion into personalty — a decree of another State admitting a will to probate — duty of a claimant to assert rights in that State — a surety on an executor's bond cannot be sued until the executor is in default.*] 1. The complaint in an action brought by Nellie Garvey against Francis J. Horgan as ancillary executor of the estate of Richard Garvey, deceased, the United States Fidelity and Guaranty Company and others, alleged that Richard Garvey died a resident of the State of Massachusetts, leaving a pretended last will and testament which was void by reason of the testator's incapacity to make the same; that the plaintiff was the sole heir at law and next of kin of Richard Garvey, deceased, who was one of the heirs at law of Andrew J. Garvey, deceased; that the said Andrew J. Garvey died seized of certain lands situate in the city of New York, and that, by terms of his will, which was admitted to probate in the county of New York, he devised such real estate to a trustee upon certain trusts and gave the trustee power to sell and convey such real estate; that the trustee exercised the power of sale and that subsequently all of the parties interested under the will, except this plaintiff, entered into an agreement that the proceeds of the sale of the property should be divided and distributed among them in specified proportions; that, if Richard Garvey had been alive, he would have been entitled to receive, pursuant to this agreement, the sum of \$29,212.63.

The complaint further alleged that the pretended will of Richard Garvey was admitted to probate in the State of Massachusetts and that ancillary letters testamentary were thereafter issued to the executor named therein by one of the surrogates of the county of New York; that thereupon the said sum of \$29,212.63 was paid to such executor notwithstanding that the plaintiff had previously demanded that payment of such sum be made to her; that the United States Fidelity and Guaranty Company was the surety upon the bond of the executor named in the will of Richard Garvey and was in possession of the fund. The relief demanded was that the plaintiff have judgment against the defendants for the amount of the fund.

*Held*, that, in the absence of an allegation to that effect in the complaint, the plaintiff could not raise the question whether devises to charitable corporations contained in the will of Andrew J. Garvey aggregated more than one-half of the value of the testator's estate and were, therefore, invalid;

That, aside from this question, the will of Andrew J. Garvey worked an equitable conversion of all the testator's real estate into personalty and that nothing, therefore, descended under the will of Andrew J. Garvey which the plaintiff could take as heir at law;

That the decree of the Massachusetts court admitting the will of Richard Garvey to probate was conclusive in the State of New York, and that, as long as such decree remained in force, the plaintiff, who was not mentioned in the will, was not entitled to any portion of the estate of the said Richard Garvey;

That the plaintiff was obliged to assert whatever rights she had in the fund in question in a proceeding in the courts of the State of Massachusetts;

That the plaintiff could not maintain an action against the surety upon the bond of the executor named in the will of Richard Garvey until the liability of the executor to respond to her had been established and he had failed to comply with the direction to pay over the fund.

**GARVEY v. U. S. FIDELITY & GUARANTY Co** ..... 391

2. — *Action to determine the validity of the probate of a will — testimony of physicians based upon a diagnosis of incipient paresis made by one of them three years before the testator's death and contradicted by his subsequent condition — it does not require the submission of the case to the jury.*] Upon the

**WILL — Continued.**

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trial of an action, brought under section 2653a of the Code of Civil Procedure to determine the validity of the probate of a will, the only evidence given by the plaintiff to support his contention that the testator was mentally incompetent at the time he executed the will was the testimony of three physicians, only one of whom had ever seen the testator. The last-mentioned physician, who had attended the testator some three years prior to the execution of the will and the death of the testator, testified that he then diagnosed the testator's illness as incipient paresis. The other two physicians testified, in answer to hypothetical questions based upon the assumption that the first physician's diagnosis was correct, that the testator was mentally incompetent at the time the will was executed.

Every physician or other person who was in a position to observe the testator during the three years prior to his death testified, on behalf of the defendants, that the development of the testator's ailment was inconsistent with the diagnosis that the testator was suffering from incipient paresis, and the physician who made such diagnosis admitted that, if the symptoms thereafter appearing had been correctly stated by such witnesses, his conclusion that the testator was suffering from paresis was erroneous.

*Held*, that the plaintiff's evidence did not destroy the presumption of the testator's mental capacity nor the presumption which the Code of Civil Procedure provides shall follow the probate of a will;

That it was the duty of the trial court to direct a verdict dismissing the complaint.

The mere opinions of expert witnesses, based upon an erroneous hypothesis, cannot prevail as against facts opposed to such opinions testified to by a great number of competent observers. *PHILIPS v. PHILIPS* ..... 118

3. — *Proof required to admit it to probate, where the attorney who prepares it and attends to its execution is a beneficiary thereunder.*] Upon a proceeding for the probate of a will it appeared that the decedent had no children; that his next of kin were a sister and an infant child of a deceased brother; that the decedent was addicted to drink, and that the proponent of the will, who, by the terms thereof, was appointed sole executor and given one-half of the testator's estate, was a lawyer to whom the decedent had given a sum of money which the proponent was accustomed to dole out to the decedent from day to day in sums sufficient to gratify his appetite for drink and to provide the means of existence. The will was drafted by one of the proponent's clerks and was executed in the proponent's office. The only persons present at the time of the execution were the decedent, the proponent and the two subscribing witnesses. One of the subscribing witnesses was a clerk of the proponent and the other a clothing dealer from whom the decedent was in the habit of purchasing clothes upon the order of the proponent.

The subscribing witnesses testified to the execution of the will in conformity with the requirements of the statute. Evidence was also given tending to show that the decedent was sober and of sound mind when he executed the will. There was no evidence of the testamentary intention of the decedent prior to the execution of the will or that he gave any instructions for its preparation or had any independent advice upon the subject.

*Held*, that the relations between the decedent and the proponent were such as to impose upon the proponent the burden of proving by evidence other than that of the formal execution of the instrument that it was the free, untrammelled and intelligent expression of the wishes and intention of the testator;

That no such affirmative evidence had been given, and that the surrogate was justified in refusing to admit the will to probate.

*MATTER OF RINTELEN* ..... 142

4. — *Provision directing a sale—presumption when it does not provide for taking back a bond and mortgage.*] A will, which directed the testamentary trustees to sell the testator's realty, was silent as to whether the sale should be made wholly for cash or partly on bond and mortgage.

*Held*, that the failure of the will to authorize a sale on bond and mortgage raised a presumption that it was the intention of the testator that the property should be sold for cash. *SHRADY v. VAN KIRK* ..... 261

**WILL — Continued.****PAGE.**

— Specific performance of a contract, alleged to have been made by one since deceased, to devise a house to a relative in consideration of the latter's agreement to care for her. *BRAUN v. OCHS*..... 20  
*See CONTRACT.*

— When an executor has legal capacity to sue — interest of an executor's executors in the construction of the original testator's will.  
*LEGGETT v. STEVENS*..... 612  
*See PLEADING.*

— Agreement by a person to leave all his property to one who should live with him as a daughter — specific performance thereof.  
*HALL v. GILMANN*. (No. 1)..... 453  
*See PLEADING.*

**WITNESS** — When it does not involve a personal transaction with a decedent. *STIRLING v. KELLEY*..... 621  
*See EVIDENCE.*

— *Admissibility of testimony of.*  
*See EVIDENCE.*

**WRITTEN INSTRUMENT:***See CONTRACT.*

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